Practice [illegible] placed:

OR, THE

RULES and CASES

OF

PRACTICE

IN THE COURTS OF

King's Bench and Common Pleas,

METHODICALLY ARRANGED.

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IN TWO VOLUMES.
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PRACTICE

OF THE

KING'S BENCH

AND

COMMON PLEAS.

Of Priſoners.

Of proceeding againſt Priſoners.

FORMERLY by the practice of the reſpective courts, when a defendant was arreſted upon *meſne proceſs*, and for want of *bail* was committed to gaol, unleſs the plaintiff, before the end of two terms after the arreſt, cauſed the defendant, by writ of *habeas corpus*, to be removed, to be charged with a declaration: ſuch priſoner, upon *common bail*, or appearance by attorney, was diſcharged from his impriſonment.

But by 4 & 5 *W. and M. c.* 21. it is enacted, "That where any defendant, or defendants, be taken, or charged in cuſtody, at the ſuit of any perſon or perſons, upon any *writ* * *or writs*, out of any of the ſaid courts at *Weſtminſter*, and impriſoned or detained in priſon, for want of ſureties for their appearance to the ſame, the plaintiff or plaintiffs, in ſuch writ or writs, ſhall and may, by virtue of the ſaid act, *before the end of the next term after ſuch writ or proceſs ſhall be returnable*, declare againſt ſuch priſoner or priſoners, in the reſpective court or courts out of which the writ or writs ſhall iſſue, whereupon the ſaid priſoner or priſoners ſhall be taken and impriſoned, or charged in cuſtody; and ſhall and may cauſe a true copy thereof to be delivered to ſuch priſoner or priſoners, or to the gaoler or keeper of the priſon or gaol, in whoſe cuſtody ſuch priſoner ſhall be or remain; to which declaration or declarations, the ſaid priſoner or priſoners ſhall appear and plead; and if ſuch priſoner ſhall not appear and plead to the ſame, the plaintiff or plaintiffs, in ſuch caſes, ſhall have judgment in ſuch manner as if the priſoner or priſoners had appeared in the ſaid reſpective courts, and refuſed to anſwer or plead to ſuch declaration."

And by ſect. 3 it is further enacted, "That in all declarations againſt any priſoner or priſoners, detained in priſon by virtue of any writ or proceſs, iſſued out of the court of *King's*

* But if the *ac etiam* of the writ be debt, you cannot declare in caſe on that writ, *per* all the officers; becauſe the ſtatute ſays, that you ſhall declare on ſuch writ, *Sed quære?*

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Bench, it ſhall be alledged in cuſtody of what ſheriff, bailiff, or ſteward of any franchiſe, or other perſon, having the return and execution of writs, ſuch priſoner or priſoners ſhall be at the time of ſuch declaration, by virtue of the proceſs of the ſaid court, at the ſuit of the plaintiffs; which allegation ſhall be as good and effectual, to all intents and purpoſes, as if ſuch priſoner or priſoners were in the cuſtody of the *Marſhal of the Marſhalſea* of our ſovereign Lord, &c."

Upon the foregoing ſtatute of W. & M. the Judges of the reſpective courts made the following rules: *Eaſt.* 5 *W. & M.*

In B. R.	In C. B.
1. That no copy of a declaration be delivered to any priſoner in cuſtody, before the day of the return of the proceſs upon which the defendant was taken or charged in cuſtody.	1. No copy of a declaration ſhall be delivered to any priſoner, until after the proceſs, upon which ſuch priſoner ſhall be taken or charged in cuſtody, be returnable.
2. That no rule be given for the defendant in cuſtody to appear and plead to any declaration againſt him, until an affidavit be filed with the clerk of the rules, of the delivering a copy of ſuch declaration, and of the time when, and the perſon to whom, the ſaid copy was delivered; and that the defendant was arreſted, or charged in cuſtody, by proceſs out of this court, returnable before the delivery of ſuch copy; and that the time of filing ſuch affidavit be entered upon the affidavit by the clerk of the rules; and that a copy of ſuch affidavit be produced to the prothonotary or ſecondary before the ſigning the judgment.	2. No rule ſhall be given for the defendant, in cuſtody, to appear and plead to any declaration againſt him, until an affidavit be filed, with the proper ſecondary, of the delivery of the copy of ſuch declaration, and of the time when, and the perſon to whom, the ſaid copy was delivered; and a copy of the ſaid affidavit ſhall be produced to the prothonotary before judgment ſigned, together with a certificate from the proper officer that no appearance is entered with him.
3. If a copy of the declaration be delivered againſt ſuch defendant, before "one month	3. If a copy of a declaration be delivered before *menſem Paſchæ*, or *craſtinum animarum*,

 and

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of *Eaſter*," or, "the morrow of *All Souls*," and affidavit be made thereof and filed, and the defendant doth not appear before the end of ten days after *Eaſter* and *Michaelmas* term reſpectively, judgment may be entered againſt him, if rules have been given; but if he doth appear before the end of ten days after the term, he ſhall imparl until the next term, [unleſs the action be in *London* or *Middleſex*] and the defendant be in priſon within forty miles of *London* or *Weſtminſter*; then, though he doth appear before the expiration of ten days after the end of the term, he ſhall plead two days before the Eſſoign Day of the next term; and in default thereof [rules for pleading having been given], judgment may be entered againſt him as aforeſaid.

4. If a copy of the declaration be delivered againſt ſuch defendant, on or after "one month of *Eaſter*," in *Eaſter* term, or, "the morrow of *All Souls*," in *Michaelmas* term, or in *Hilary*, or *Trinity* term, and thereupon the plaintiff gives a rule to appear and anſwer; then, if the defendant appears two days before the Eſſoign Day of the next term, he ſhall imparl until the ſaid next term; but if he doth not appear within that time, judgment ſhall be given againſt him.

In C. B.

and affidavit thereof be made and filed; and the defendant doth not enter his appearance with the proper officer within ten days after *Eaſter* or *Michaelmas* term reſpectively, judgment may be entered againſt him, upon ſuch certificate, if rules have been given; but if he does not enter his appearance as aforeſaid, within ten days after ſuch term, he ſhall imparl until the next term, unleſs the action be in *London* or *Middleſex*, and the defendant be in priſon within forty miles of the cities of *London* or *Weſtminſter*; and then, though the priſoner doth appear within ten days after the end of the term, he ſhall plead two days before the Eſſoign Day of the next term; and in default thereof, rules having been given, judgment may be entered againſt him as aforeſaid.

4. If a copy of the declaration be delivered on or after *menſem Paſchæ* in *Eaſter* term, or *craſtinum animarum* in *Michaelmas* term, or in *Hilary* term or in *Trinity*, and the plaintiff ſhall thereupon give a rule to appear and plead; if the defendant enters his appearance two days preceding the Eſſoign Day of the next term, he ſhall imparl until the next term; but if he ſhall not appear within that time, judgment may be entered againſt him as aforeſaid.

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5. If a writ be returnable in any term, and a copy of the declaration has been delivered before the Eſſoign Day of the next term, the plaintiff, in ſuch next term, may give rules to appear and plead; and if the defendant does not appear and plead, upon the expiration of the rules, judgment ſhall be given againſt him.

6. If the declaration be not filed before the end of the next term, after the writ or proceſs by which the priſoner was taken or charged in cuſtody, is returnable, and affidavit made and filed in manner as aforeſaid, before the end of twenty days next after ſuch term, the priſoner ſhall be diſcharged by common bail, ſigned by one of the juſtices of this court.

7. If any gaoler or keeper of a priſon, having received a copy of a declaration againſt any priſoner in his cuſtody, ſhall ſuppreſs the ſame, and not deliver it forthwith unto ſuch priſoner, an attachment ſhall be iſſued againſt him.

In C. B.

5. If the writ be returnable in one term, and a copy of the declaration be delivered before the Eſſoign Day of the next term, the plaintiff in ſuch declaration may give a rule to appear; and if the defendant doth not enter his appearance, and plead by the time the rules are out, judgment may be entered againſt him.

6. If the declaration be not entered, or left in the office, before the end of the next term after the return of the writ or proceſs [by which the defendant ſhall be taken or charged in cuſtody], and an affidavit made and filed in manner aforeſaid, before the end of twenty days after ſuch term [*Eaſter* term excepted, and within ten days after *Eaſter* term], the priſoner ſhall be diſcharged, upon entering his appearance with the proper officer, by writ of *ſuperſedeas* made by him according to the ancient practice of this court.

7. If any gaoler or keeper of any priſon, having received a copy of a declaration againſt any priſoner in his cuſtody, ſhall ſuppreſs the ſame, or not deliver it forthwith to ſuch priſoner, an attachment ſhall be entered againſt him.

A priſoner committed for a *contempt*, cannot be charged with a declaration, without leave of the court. *Pract. Reg.* 325.

But if he accepts a declaration, and ſuffers plaintiff to take judgment, he has no remedy. *R. and O. B. R. and C. B.* 2 *vol.* 31.

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One in cuſtody, on an *attachment*, cannot be charged in execution, without leave. *Pract. Reg.* 825.

A priſoner in cuſtody on a *criminal* account, cannot be charged with a *civil* action, without leave of the court. *Salk.* 354.

But a priſoner on a charge of *felony*, may be charged with a *latitat*. *Daintree* v. *Juſtice*. *Hil.* 9 *Geo.* 3.

A perſon attainted even of high treaſon, may be charged with a civil action, by leave of the court. *Ramſden and another*, v. *Macdonald*, 1 *Wilſ.* 217.

The court will not give leave to charge a priſoner with an action, who has a pardon upon condition of tranſportation, becauſe it would defeat the effect of the pardon, and render the priſoner incapable of performing the condition on which he was pardoned. *Ld. Raym.* 848.

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IF a defendant, upon being arreſted, cannot find bail, but goes to priſon, and does not remove himſelf by *habeas corpus*, or the plaintiff does not remove him by *habeas corpus* into the *priſon of the court*, the plaintiff may declare againſt him in the cuſtody of ſuch ſheriff or bailiff *.

In ſuch caſe, of a defendant's remaining in *actual* cuſtody for want of bail, the plaintiff in either court muſt declare againſt him in *two terms* †, otherwiſe, if in B. R. defendant may be diſcharged by *ſuperſedeas* granted by the court, or one of the Judges of it, on filing *common bail*; unleſs upon due notice given to plaintiff's attorney, good cauſe be ſhewn to the contrary.—And if the ſuit is in C. B. defendant may be diſcharged at the expiration of the *two terms*, by a *ſuperſedeas* to be allowed by one of the Judges, unleſs cauſe ſhewn to the contrary, upon notice given to plaintiff or his attorney.—*Vide* the diſtinction between the *two terms* in this court, and in B. R. next page.

In C. B. upon a *ſuperſedeas*, for want of declaring *within two terms*, common bail muſt be filed of the term the *ſuperſedeas* iſſued. *Reg.* 14, 15 *Car.* 2.

Before the rule *Hil.* 26 *Geo.* 3. *B. R. Maſter Benton* thought, that if defendant did not *ſuperſede* himſelf till the *third* term, and filed *common bail* as of that term, yet he was not obliged to accept a declaration; and *Mr. Cowper*, clerk of the rules in B. R. had ſome doubt, whether a priſoner, *ſuperſeded on filing common bail*, might not ſign a *nonpros* as ſoon as common bail filed, becauſe plaintiff had not declared *within the two terms*; but this ſeems impoſſible; though there can be no doubt that he might ſign ſuch *nonpros* at the end of the *two* terms after bail filed.

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* But if the priſoner is in cuſtody by virtue of proceſs from the King's Bench, that is, proceſs of *bill* or *latitat*, plaintiff muſt expreſs in his declaration, in whoſe cuſtody defendant is, by virtue of the proceſs at the ſuit of the plaintiff, which ſhall be as effectual as if defendant was in the cuſtody of the Marſhal.

† In the King's Bench by rule *Hilary* 26 *Geo.* 3. plaintiff muſt cauſe the declaration to be delivered to ſuch priſoner, or to the gaoler or turnkey, *before the end of the next term after the return of the proceſs*—and if in cuſtody of the Sheriff, *&c.* [and not of the *Marſhal*], an *affidavit* muſt be made, and filed with the clerk of the rules, of the delivery of ſuch declaration, time when, and to whom delivered, before the firſt day of the next term after the delivery of ſuch declaration.

By

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By rule *Hil.* 26 *Geo.* 3. plaintiff muſt now declare *before the end of the next term after the return of the proceſs*, whether the defendant be taken, detained, or charged in cuſtody, in all caſes; otherwiſe he will be *ſuperſedeable* on filing *common bail*, unleſs upon notice good cauſe be ſhewn to the contrary; and unleſs defendant is in the cuſtody of the *Marſhal*, there muſt be an *affidavit* made and filed with the *clerk of the rules*, of the delivery of the declaration, the time when, and to whom delivered, *before the firſt day of the next term after the delivery of the declaration* *.

The *King's Bench* held before this laſt rule, that a defendant *priſoner*, although *ſuperſedeable*, but not actually ſuperſeded, if found in cuſtody, may be charged with a declaration. *Hutchings & Kentrick. Burr. Rep.* 4 *pt.* 1048.

In C. B.

In this court it is held, that a priſoner is not *ſuperſedeable* for want of a declaration, *till the end of the term after that in which the proceſs is returnable*, not that in which he is arreſted. *Mich.* 19 *Geo.* 3. 2 *Blackſ. Rep.* 1242. The writ was of *Eaſter term*, returnable the *firſt return of Trinity*, and defendant was arreſted before the end of *Eaſter* term, and for want of a declaration in the courſe of *Trinity*, he moved for a *ſuperſedeas*, but the court denied it, ſaying plaintiff had time till the end of *Michaelmas*, by the practice and rules of this court. —So note the difference between this and B. R.

In the *Common Pleas* it is otherwiſe. Plaintiff not having declared againſt defendant, a *priſoner*, before the end of the *ſecond term*, the defendant took out a Judge's ſummons for a *ſuperſedeas*, 28th of Oct. and plaintiff's agent had time to write

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* By the rule *Hil.* 26 *Geo.* 3. *B. R.* where a priſoner ſhall be taken or charged in cuſtody by any Sheriff or other officer, by *meſne proceſs* out of B. R. and ſhall afterwards be removed by *habeas corpus*, and committed thereupon by this court, or any of its Judges, to the cuſtody of the Marſhal, the time for plaintiff's proceedings againſt ſuch priſoner ſhall commence and be computed from the priſoner's being firſt taken or detained in cuſtody by virtue of ſuch proceſs.

And by the ſame rule, no treaty or agreement ſhall be ſufficient cauſe to prevent defendant's having benefit of a *ſuperſedeas* for want of proſecution, unleſs the ſame be in writing, ſigned by the defendant or his attorney, or other perſon authorized by defendant, and it be therein expreſſed that proceedings are ſtayed at defendant's requeſt.

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to his client; not being able to ſhew cauſe againſt it, a *ſuperſedeas* was ordered on the *11th of Nov.* but could not be ſealed that night, but on the 13th was ſent into the country. The plaintiff after the ſummons ſerved, *viz. 1ſt of Nov.* charged defendant in cuſtody with a declaration, and on the 13th ſigned judgment, ſent down a *teſtat. ca. ſa.* and charged him in execution. The court held plaintiff's proceedings, ſubſequent to the time of defendant's being *ſuperſedeable* and having applied for a *ſuperſedeas* to be irregular, and ſet aſide the *ca. ſa.* with coſts, on defendant's conſenting not to bring an action. *Barnes*, 400.

Neither court will grant plaintiff a rule for time to declare againſt a priſoner. *Prac. Reg.* 327.

But where in a writ againſt *three*, one was arreſted and lay in gaol, and the other two abſconded, the court refuſed to diſcharge the priſoner, ſaying that he muſt appear for all, or lie in gaol till the other two are outlawed; but in ſuch caſe, plaintiff muſt move for time to declare againſt him in cuſtody. *Eaſt.* 12 *Geo.* 3.

So where in an action againſt *two*, and one defendant was committed to the *Fleet*, and charged with the action for want of *bail*, and the other abſconded, ſo that the plaintiff was not able to bring him into court by arreſt, and therefore took out proceſs of *outlawry* againſt him, which unavoidably overrun the time for declaring, viz. the *two terms*; the court thought it reaſonable, as the plaintiff could not declare againſt the other, he neither being outlawed, nor in court, to allow a further time to declare. *Barnes*, 401. But in ſuch caſe the court will expect plaintiff to ſhew, that he has uſed all diligence to *outlaw* the other. *Barnes*, 396.

More than two terms had expired after the priſoner was in cuſtody, and before the plaintiff declared; and it was moved, that

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that the priſoner might be diſcharged by *ſuperſedeas*, the plaintiff having neglected to declare *within the two terms*. On ſhewing cauſe, it appeared by affidavits, that there had been a treaty of accommodation between the plaintiff and the defendant; and that breaking off, then the plaintiff declared; and the court held, that while a treaty ſubſiſts between plaintiff and defendant a *priſoner*, the plaintiff is not obliged to declare within the *two terms*, according to the practice; for it is for the priſoner's benefit, that plaintiff liſtens to propoſals of accommodation. 3 *Wilſ.* 455. *C. B.*

The court of B. R. refuſed to diſcharge a *priſoner* out of cuſtody, for want of proceeding againſt him *within two terms*, a miſtake having ariſen from two perſons being of the ſame name. *Leſt.* 274.

The plaintiff had *two* different cauſes of action againſt defendant, one as *adminiſtrator*, the other as *aſſignee*. Defendant was arreſted at plaintiff's ſuit as *adminiſtrator*; but in the title of the affidavit for bail, *adminiſtrator* was omitted though put in the writ. Defendant remained in cuſtody for want of bail, and the plaintiff did not declare as *adminiſtrator*, agreeable to his writ, but made a new affidavit of his other demand as *aſſignee*, and delivered a declaration in the county gaol indorſed for bail. The rule to ſhew cauſe why a *ſuperſedeas*, &c. in the firſt cauſe, was made abſolute, the affidavit being a nullity: but the arreſt in the ſecond cauſe was held not to be void. *Barnes*, 391. *C. B.*

But where plaintiff arreſted defendant as *executrix*, and finding the action wrong as *executrix*, made a new affidavit for bail, and charged defendant with a new declaration in her own right: and upon defendant's moving for a *common appearance* and *ſuperſedeas*, the court held, that if there had been two different cauſes of action, the ſecond declaration would have been a good charge: but there being but one and the ſame cauſe of action, the proceedings were irregular, and made the rule abſolute to ſet aſide the proceedings. *Barnes*, 391. *C. B.*

The defendant was arreſted by writ returnable in *Mich. term*, and remained in cuſtody after the end of *Hilary* following, and then became *ſuperſedeable* for want of a declaration; but not applying for a *ſuperſedeas*, and ſtaying in priſon till *Eaſter*, plaintiff then diſcontinued the firſt action, and after tendering defendant 6 s. 8 d. for coſts taxed on the diſcontinuance, charged defendant in the cuſtody of the Sheriff with a new writ for the old cauſe. Rule abſolute for a *ſuperſedeas* on entering a common appearance. *Barnes*, 396. *C. B.*

If

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If a *priſoner* on *meſne proceſs* eſcape, and is retaken on an eſcape warrant, and in cuſtody of the Sheriff, &c. the plaintiff muſt declare againſt him within *two terms* after taken on eſcape warrant. *Reg.* 6 *Anne*, *B. R.* and the ſame practice *in C. B.* 1 *Barnes*, 285.

If a priſoner eſcapes, his reception ſhall be looked on as the time of the render from whence the plaintiff is to proceed. *Barnes*, 382.

If a defendant is in the cuſtody of the *Sheriff*, and the plaintiff has declared againſt him as in ſuch cuſtody, he may, notwithſtanding, if he thinks proper, remove the defendant into the cuſtody of the *Marſhal* by *habeas corpus ad faciendum & recipiendum*: for the act 4 & 5 *W. & M.* was only made for the eaſe and benefit of plaintiffs, to ſave them the trouble and expence of ſuing out an *habeas corpus* to bring the defendant into court, and does not take away the plaintiff's *common law* right to remove him. *Dr. Battesworth & Bell, Eſq; Burr. Rep.* 4 *pt.* 1875.

But ſuch *habeas corpus* muſt be teſted in term, though it may be returnable *immediate*.

If the priſoner was arreſted and in cuſtody at the ſuit of the plaintiff, there is no need of an *affidavit* on delivering the declaration [as there muſt be when he is already in cuſtody at the ſuit of another], becauſe there was one on the writ. *Rules & Orders, K. B. & C. B.* 2 *Vol.* 144. *Pract. Reg.* 330.

A declaration againſt a priſoner in cuſtody, muſt ſhew at whoſe ſuit he is in cuſtody. *L. Raym.* 1362. *S. P.* 1 *Wilſ.* 120.

In C. P. on a motion to ſtay proceedings upon a declaration delivered againſt a priſoner in a county gaol, becauſe the declaration had not been entered in the *Prothonotary*'s office before delivered, the court ſaid that it was ſufficient to enter the declaration any time before giving a rule to plead. *Barnes*, 372.

Of proceeding against Prisoners in Custody of the Sheriff, &c. under a prior Commitment.

WHERE one has cause of action against a *prisoner* already in the custody of the *Sheriff*, &c. he may, instead of removing the *prisoner* into the court above, charge him with such action in the custody of the *Sheriff*, &c. But if he would remove him, he must take out an *habeas corpus ad respondendum*.

If the cause of action is not *bailable*, or under 10 l. the prisoner must be served with a copy of the process, as in other cases; and if he neglects to file *common bail*, or enter a *common appearance*, the plaintiff, on affidavit of service, may do so for him, and proceed in such cases according to the statute, as against any other defendant.

But if the cause of action is above 10 l. and plaintiff would proceed so as to hold him to *bail*, then plaintiff, if in B. R. *must make an affidavit thereof, and file the same with the clerk of the rules*.—If in C. B. *he must sue out a special capias*, on which a warrant must be lodged *with the gaoler*, in order to detain him in custody.

In B. R. plaintiff, in order to charge a prisoner in custody of the *Sheriff*, &c. makes three copies of a declaration,—one on triple penny stampt parchment, called the *bill*, which must be filed with the clerk of the declarations—another on triple penny stampt paper, to deliver to the prisoner himself, or leave with the gaoler or turnkey—the third, like the last, to be filed with the *clerk of the rules*; to which must be annexed an *affidavit* of the delivery of the one to the prisoner or turnkey, of which *declaration* and *affidavit* he will make an office copy on stamps, or the plaintiff's attorney may do it himself: but if he does, he must take it to the *clerk of the rules* to be marked, when he files the *original* declaration and affidavit, and pay for the same according to the length.

In C. B. the plaintiff must file his *declaration* with the *prothonotary*, and serve a copy thereof on the prisoner, or leave the same with the *gaoler* or *turnkey*.

In B. R. the affidavit of the delivery of the declaration must be filed with the *clerk of the rules* before the first day of the next term after the declaration delivered.—By the rule *Hil.* 26 *Geo.* 3.

In C. B. there must be a like *affidavit* of the delivery, filed with the *prothonotary* within the like time: but if *Easter term* is the

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the *ſecond term*, ſuch *affidavit* muſt be filed *within ten days* after, &c. *

The plaintiff in this caſe muſt declare *within two terms* [that is in B. R. before the end of the next term after the return of the proceſs], and the *clerk of the rules* if in B. R. or *prothonotary* if in C. B. will enter a rule for defendant to appear and plead on the office copy of the declaration; after which, if he fail to plead in due time, a demand of a plea being made, judgment may be ſigned: and if he does appear and plead, then the proceedings are the ſame as in other caſes.

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* *Note*, A like *affidavit* is requiſite, though defendant removes himſelf from one gaol to another; but if he is in cuſtody of the *Marſhal*, no ſuch *affidavit* is neceſſary.

Of proceeding againſt Priſoners in the Cuſtody of the MARSHAL and of the WARDEN OF THE FLEET.

In B. R.

IN all caſes in this court, where a priſoner is taken, detained, or charged in cuſtody by *meſne proceſs*, the plaintiff muſt deliver a declaration *before the end of the next term after the return of the proceſs*—otherwiſe he will be ſuperſedeable, unleſs good cauſe ſhewn to the contrary on notice.—And in caſe of a *commitment, or ſurrender to the Marſhal in diſcharge of bail* after the return of the proceſs, and before a declaration delivered, unleſs the plaintiff ſhall cauſe a declaration to be delivered as aforeſaid, *before the end of the term next after ſuch commitment or ſurrender*, and due notice of ſuch ſurrender given, the priſoner ſhall be diſcharged by writ of *ſuperſedeas*, to be granted as aforeſaid, on filing common bail, unleſs upon notice given to the plaintiff's attorney good cauſe ſhall be ſhewn to the contrary. *Regl. Hil.* 26 *Geo.* 3.

In C. B.

If any defendant ſhall render himſelf, or be rendered, to the *Fleet* priſon, in diſcharge of his bail, at the ſuit of any plaintiff, where no declaration has been delivered, unleſs the plaintiff ſhall declare againſt ſuch defendant *within two terms* after ſuch render, ſuch defendant may be diſcharged out of cuſtody by *ſuperſedeas*, to be allowed by one of the juſtices of this court, if cauſe be not ſhewn to the contrary by the plaintiff or his attorney, upon notice to either of them given by the defendant's attorney or agent, and *affidavit* made of ſuch notice. *Reg.* 8 *Geo.* 1.

In B. R. where a priſoner ſhall be taken or charged in cuſtody by *meſne proceſs* out of this court, and ſhall afterwards be removed by *habeas corpus*, and committed by this court, or a Judge, to the Marſhal, the time for plaintiff's proceedings againſt him ſhall be computed from the priſoner's being firſt taken, detained, or charged, by virtue of ſuch proceſs. *Reg. Hil.* 16 *Geo.* 3.

If a priſoner was arreſted, and in cuſtody at the ſuit of the plaintiff, there is no need of an *affidavit* on delivery of the declaration, becauſe in ſuch caſe there muſt have been one on the writ: whereas if the declaration be as a new charge, there muſt be a new affidavit. *Rules and Orders, K. B. & C. B.* 2 *vol.* 144.

If

Of proceeding againſt Priſoners in the Cuſtody of the MARSHAL and of the WARDEN OF THE FLEET.

If a perſon has cauſe of action againſt a defendant, priſoner in the cuſtody of the *Marſhal* or *Warden of the Fleet*, he may charge ſuch defendant in cuſtody by delivering a *declaration*, obſerving the following rules.

In B. R.

For preventing the detainer of priſoners, charged by *declarations*, in the cuſtody of the *Marſhal of the Marſhalſea* of this court, where the cauſe of action againſt ſuch priſoners does not amount to 10l. *and upwards*—It is ordered, that from and after the laſt day of this term, no declaration, whereby any priſoner ſhall be charged in the cuſtody of the *Marſhal*, ſhall be ſufficient cauſe of detaining ſuch priſoner in cuſtody, unleſs an *affidavit*, that the plaintiff's cauſe of action againſt ſuch priſoner does amount to 10l. or upwards, ſhall be firſt made and filed with the *clerk of the rules of this court, and the ſum ſpecified in ſuch affidavit ſhall be indorſed by him upon ſuch declaration*, before the leaving thereof with the turnkey. *Eaſt.* 15 *Geo.* 2.

In C. B.

For preventing the detainer of priſoners, charged by *declarations*, delivered at the *Fleet priſon*, where the cauſe of action againſt ſuch priſoners does not amount to 10l.—It is ordered, that no copy of a declaration delivered at the *Fleet priſon*, againſt any priſoner there, ſhall be ſufficient charge to hold ſuch priſoner to bail, or to retain ſuch priſoner in cuſtody for want of bail, unleſs an *affidavit*, that the plaintiff's cauſe of action amounts to 10l. or upwards, be firſt made and filed in the prothonotary's office, and an indorſement made by the ſaid *prothonotary, or his deputy, upon ſuch copy of a declaration, ſignifying the ſum of money ſpecified in ſuch affidavit*; for which ſum ſo indorſed, bail ſhall be required, and no more. *Hil.* 8 *Geo.* 2.

In explanation of the above rule, it has been adjudged, that if a defendant, arreſted by proceſs iſſuing out of the court of *King's Bench*, and in cuſtody for want of bail, remove himſelf by *habeas corpus* to the *Fleet priſon*, and the plaintiff charges him in the *Fleet* with a copy of a *declaration*, he is not obliged to make and annex an affida-

Hence vit,

Of proceeding against Prisoners in the Custody of the MARSHAL and of the WARDEN OF THE FLEET.

In K. B.

Hence it appears, that where a defendant is in the custody of the *Marshal*, under a former *commitment*, you may deliver a declaration, and not serve him with process, whether the cause of action requires bail or not; but if the action requires *bail*, there must be *an affidavit filed with the clerk of the rules*; else it is no cause of detainer, if he should be *superseded* in other actions against him; but then, as in all cases where the cause of action does not require bail, *common bail* must be filed in those actions, on being superseded in such actions as require *bail*.

Process may be served on a man in custody of the *Marshal*, having surrendered himself to take the benefit of the act for relief of *insolvent debtors*. *Pry v. Lawford*, 3 *Geo.* 2.

To

In C. B.

vit, as by the above rule is directed, in regard there was an affidavit made of the debt when the plaintiff took out the process upon which the defendant was arrested; but if a declaration comes in as a new charge against a prisoner in custody at the suit of another plaintiff, there the above rule must be observed. *Rep. & Cas. of Pract. C. B.* 144. *Barnes*, 72. *Pract. Reg. C. P.* 330.

If any person hath cause of action *against a prisoner committed to the Fleet*, he may deliver a *copy to the defendant or turnkey*, and after rule given to plead, *to be out in eight days after delivery of the declaration*, and *affidavit* being made of the delivery, the plaintiff may sign judgment as if the defendant had been charged at the bar of the *Common Pleas* [*or Exchequer*] with such action. 8 & 9 *W.* 3. *c.* 27.

A prisoner surrendering as a *fugitive*, cannot be charged with a declaration under this act, because *not committed*. *Prac. Reg.* 126. 1 *Barnes*, 281; but it seems he may be arrested. *Ibid.*—and *vide* 2 *Blackf. Rep.* 970. That a *fugitive* surrendering himself to the *Fleet*, under the insolvent act, is not a

prisoner

Of proceeding againſt Priſoners in the Cuſtody of the MARSHAL and of the WARDEN OF THE FLEET.

In B. R.

To charge a priſoner in cuſtody of the *Marſhal*, in vacation time [inſtead of the old method of ſuing out an *habeas corpus ad reſpond.* teſted as of the laſt term], the plaintiff muſt *file a bill of the preceding term*, and then deliver or leave for the defendant in cuſtody, a *copy of the declaration as of the preceding term*, and make an affidavit of the delivery thereof. *Burr.* 47, 1052.

And ſo in term time, and the defendant is a priſoner in cuſtody of the *Marſhal*, you ingroſs and file a *bill*, and deliver a copy of *the declaration thereon* to the priſoner himſelf, or leave the ſame with the turnkey, and give a rule to plead, demand a plea, and proceed as in other caſes.

In this court a *bill* muſt always be filed againſt a *priſoner*; and for want of it, he is intitled to a *ſuperſedeas*, although he has pleaded.

In C. B.

priſoner in the cuſtody of the Warden, nor liable to be charged with a declaration.

To charge a priſoner in the cuſtody of the *Warden of the Fleet*, in vacation time, the plaintiff draws his declaration as of the preceding term, gets it ſtamped by the prothonotary, and delivers or leaves it with the clerk of the papers.

To charge a priſoner in term time, the plaintiff draws his declaration, gets it ſtamped by the prothonotary, and delivers or leaves it with the clerk of the papers of the *Fleet*.

When the defendant is a priſoner in the *Fleet*, the declaration muſt be entered with the *prothonotary*, before the delivery of the declaration to the defendant; but if the defendant is in any other priſon, it need not be ſo entered before the delivery, but it is ſufficient to file it any time before a rule is given thereon to appear and plead.

And *note*,—That when the defendant is in the *Fleet*, the *original* declaration, indorſed by

Of proceeding against Prisoners in the Custody of the MARSHAL and of the WARDEN OF THE FLEET.

In B. R.

In C. B.

by the *prothonotary*, should be left at the *Fleet*, and not a copy thereof. Whereas, when the defendant is in *another gaol*, the *original declaration* is filed with the *prothonotary*, and a copy thereof delivered to the defendant. *Pract. Reg.* 331. 1 *Barnes*, 315.

A prisoner once *supersedeable*, is also so with respect to the plaintiff himself in that cause; but not as to *third* persons; for by them, so long as he is in *actual custody*, he may be charged as a *prisoner*. *Burr. Rep.* 4 *pt.* 1048.

After an irregular declaration against a prisoner, the plaintiff cannot declare *de novo*, unless the prisoner is in custody at another person's suit. *Pract. Reg.* 328.

Where a declaration is irregularly delivered, the prisoner must complain thereof before judgment. *Pract. Reg.* 329.

Defendant obtained a *supersedeas* for want of prosecution; but having, whilst in custody, drawn a bill of exchange in plaintiff's favour, for part of plaintiff's original debt, which draft was refused to be accepted, plaintiff, as defendant was going out of prison, caused him to be arrested, and held to bail, as the drawer of the said bill. Defendant swore, that by agreement between him and plaintiff, the draft, if not accepted, was to be delivered back to defendant. The court thought, that by this draft, which if accepted and paid, would have *pro tanto* discharged part of the original demand, no new debt was created, ordered a *supersedeas* to the new action, on entering a common appearance. *Barnes*, 397.

A declaration must be served on a prisoner, or left with the turnkey, though he has appeared by attorney. 2 *Blacks. Rep.* 786.

And, if a defendant is served with process, or arrested when at large, and becomes a prisoner in *the Fleet* before declaration, the declaration must be delivered to the *turnkey*. *Barnes*, 392.

Of proceeding againſt Priſoners removing themſelves when charged with Proceſs.

In B R.

IF a priſoner in the *Marſhalſea*, on *meſne proceſs*, removes himſelf to the *Fleet*, before the plaintiff has declared againſt him, the plaintiff then muſt declare in C. B. and cannot proceed further in B. R. unleſs he brings the defendant back there by *habeas corpus ad reſpondendum*.

But if a priſoner in the cuſtody of the *marſhal*, after being charged with a declaration in B. R. removes himſelf to the *Fleet*, the plaintiff muſt proceed to judgment in B. R. and then bring the defendant back by *habeas corpus ad ſatisfaciendum*, to be charged in execution in B. R.

And *note*,—That if upon the defendant's removal from B. R. to C B. before plaintiff has declared, the plaintiff does not declare within the *two terms* [*Vide* the rule *Hil.* 26 *Geo.* 3. *ante*], the defendant's application for a *ſuperſedeas* muſt be made to C. B.

But if he removes after being charged with a declaration [and not brought back by *habeas corpus*], then, for want of not being charged in execution in due time, &c. he muſt apply for a *ſuperſedeas* to B. R.

In C B.

If a priſoner in the *Fleet* removes himſelf to the *Marſhalſea* before the plaintiff has declared, the plaintiff muſt declare in B. R. and cannot proceed further in C. B. unleſs he brings the defendant back by *habeas corpus ad reſpondendum*.

And if a priſoner in the *Fleet*, charged with a declaration in C. B. removes himſelf afterwards to the *Marſhalſea*, the plaintiff muſt proceed to judgment in C. B. and then carry him back by *habeas corpus ad ſatisfaciendum*, to charge him in the *Fleet*.

And *note*,—That if upon defendant's removal from C. B. to B. R. before the plaintiff has declared, the plaintiff does not declare within *the two terms*, the defendant's application for a *ſuperſedeas* muſt be to B. R.

But if he removes, after being charged with a declaration [and not brought back by *habeas corpus*], then, for want of being charged in execution in due time, &c. he muſt apply for a *ſuperſedeas* in C. B. *Barnes*, 384, 385.

If two writs of *habeas corpus* iſſue, the one out of B. R. and the other out of C. B. where the perſon is in gaol, the writ which is firſt ſerved ſhall have the body; and the priſoner may afterwards,

Of proceeding againſt Priſoners removing themſelves when charged with Proceſs.

afterwards, by another writ, remove himſelf into the other court; but then he muſt plead firſt.

A priſoner ſurrendered by *bail*, was ſuperſeded, becauſe charged in the ſame court after he had removed himſelf. 2 *Stra.* 1153.

Motion for a *ſuperſedeas*, for want of a declaration in C. B. within *two terms*.——Defendant committed to the *Fleet* (charged *inter al'* with *a bill of Middleſex* at the plaintiff's ſuit) before declaration delivered; and afterwards the plaintiff delivered a declaration in the *King's Bench*, at the *Fleet*, and not a declaration in C. B. which declaration being delivered after the defendant had removed to the *Fleet*, as a declaration of the *King's Bench*, the Court held as null and void, and made the rule abſolute. *Barnes*, 402.

Plaintiff having made affidavit of his debt in B. R. arreſted defendant by *latitat*, indorſed for bail. Defendant removed himſelf to the *Fleet* by *habeas corpus*, charged with this *latitat*; and plaintiff declared againſt him there without making a ſecond affidavit; on which defendant moved to be diſcharged on a common appearance, inſiſting, that in order to hold him to bail regularly, plaintiff ought to have made an affidavit of his debt in this court, and procured it to be indorſed on the declaration, according to the rule 8 *Geo.* 2. A rule was made to ſhew cauſe, which was diſcharged, the court being of opinion, that the rule of court extends only to caſes, where a declaration is the firſt proceeding, and not to this caſe. *Sampſon* v. *Warren*. *Barnes*, 75.

Of the Rule to appear and plead, &c.

In B. R.

IF the defendant is in cuſtody of the *ſheriff*, a rule to appear and plead muſt not be given before *affidavit* is filed of the delivery of the declaration; which *affidavit* muſt now be filed with the *clerk of the rules, before the firſt day of the next term after the delivery of the declaration. By Reg. Hil.* 26 *Geo.* 3.

But if the defendant is in the cuſtody of the *marſhal*, no *affidavit* of delivery is neceſſary, but a rule to plead may be given of courſe. And if the declaration is delivered *four days* excluſive before the end of term, and rule given, and plea demanded [which muſt be done on the back of the declaration], the defendant muſt plead as of that term.—But if the *bill* is not filed, and copy delivered *four days* excluſive before the end of the term, the defendant may *imparl* till the next.

In C. B.

The ſame practice in the *Common Pleas*, the *affidavit* being to be filed with the *prothonotary*. But if *Eaſter term* is the ſecond term, then the affidavit of delivery muſt be filed *within ten days*.

So if defendant is a *priſoner* with the *warden*, no *affidavit* of delivery is neceſſary—and in ſuch caſe the rule to plead is out in *eight days*, incluſive.

If defendant is in a *common gaol*, and the declaration is delivered before the *eſſoign* day of the term, the rule is out in *four days*.

If a declaration is delivered to a priſoner the laſt day but one of term, he muſt plead *two days* before the eſſoign day of next term. *Barnes*, 244.

If proceſs is returnable the firſt day of *Eaſter* or *Michaelmas term*, and the declaration be delivered before *menſem paſchæ*, or *the morrow of All Souls*, and affidavit thereof filed, the defendant muſt appear before *ten days* after *Eaſter* or *Michaelmas* term; and if he appears within that time, he may imparl till the next term, *unleſs*

In *Eaſter* and *Michaelmas* terms, if the declaration is delivered before *menſem paſchæ*, or *morrow of All Souls*, the rules to plead are out in *ten days* after the term, *except the action is in London or Middleſex*, and *the defendant a priſoner within forty miles*, as in *B. R.*

If the declaration be delivered after thoſe days, the rules

Of the Rule to appear and plead, &c.

In B. R.

unless the action is in London or *Middlesex, and defendant is in prison within forty miles of London:* and then, though he appears within that time, he must plead two days before the *essoign day* of that subsequent term. *Reg. East. 5 W. & M.*

If the declaration be delivered on or after *mens. pasch.* or *morrow of all Souls*, or in *Hilary* or *Trinity*, and rules given, if defendant appears before the *essoign day* of the next term, he shall *imparl* till the next term; but if he does not appear within that time, the plaintiff is entitled to judgment.

In C. B.

rules are out in *two days* next preceding the *essoign day* of the subsequent term.

And in *Hilary* and *Trinity* terms, if the declaration is delivered on or after the *essoign day* of the term, the rules to plead are out *two days* before the *essoign day* of the subsequent term. But if defendant appears within the time, he may *imparl* as in B. R. *East. 5 W. & M.* and *Vide 1 Barnes*, 159.

If the declaration is delivered before the *essoign day* of the term next after the return of the writ, the plaintiff in such next term may give rules, and the defendant must appear and plead on or before the expiration of the rules. *East. 5 W. & M.*

Note, If a prisoner appears in person, he is bound to pay for the *issue book* upon delivery thereof; otherwise if he appears by attorney. *2 Wilf.* 11.

Notice of trial to a *turnkey* is good, in the case of a *prisoner* defendant. *Stra.* 248.

Of Judgment against Prisoners, and of charging them in Execution.

In B. R.

IF the plaintiff does not proceed to *trial or judgment within three terms** next after declaration delivered, if by the course of this court plaintiff can so proceed, or in case of a surrender in discharge of bail after a declaration delivered, unless the plaintiff shall proceed to trial or final judgment thereupon within three terms next after such surrender, and notice thereof (if by the course of the court he could so proceed), of which three terms the term wherein such surrender shall be made shall be one; the prisoner shall be discharged by writ of *supersedeas*, to be granted as aforesaid, upon filing *common bail*—unless upon notice to plaintiff's attorney good cause be shewn to the contrary. *Hil.* 26 *Geo.* 3. *B. R.*

Like discharge for want of getting a *demurrer* argued within the third term.

In C. B.

The like practice in the *Common Pleas* as in the *King's Bench, by Reg. Easter.* 8 *Geo.* 1.

So if plaintiff does not proceed within *three* terms after the render, the defendant having appeared.

Or within *three terms* after *reception*, or coming again into prison; for that time shall be looked on as the time of the render. *Barnes*, 382.

So for want of getting a *demurrer* argued within the third term. *Barnes*, 385.

The defendant, though not in custody, upon being taken, but surrendered himself in discharge of his bail, is supersedeable within the above-mentioned rule, and its construction, and the practice of the court: and the time runs from notice of the defendant's being in custody.

The defendant was discharged out of custody by *supersedeas*, on entering a *common appearance*, for want of plaintiff's proceeding to judgment within three terms after declaration delivered. Plaintiff afterwards obtained judgment, and defendant being taken in execution, moved to be discharged, insisting, that after a *supersedeas* his person was free, and could not be again detained by process in the same action. *Per Cur.* After consult-

* Of which three terms, the term in which such declaration shall be delivered shall be one, according to the rule *Hil.* 26 *Geo.* 3.

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ing all the Judges in this case, the defendant having been discharged by *supersedeas* before judgment, he is not finally discharged, but after judgment is subject to be taken in execution. But where a defendant is *superseded* after judgment, for want of being charged in execution within two terms after judgment obtained, his person cannot afterwards be taken in execution. *Barnes*, 376. *C. B.*

In all cases after trial had, or final judgment obtained against a prisoner, he must be charged in *execution within two terms*, and the term wherein such trial is had or judgment is obtained is reckoned as one, in case no writ of error be depending, or injunction obtained to stay proceedings; and if any writ of error or injunction, then *within two terms next after* judgment affirmed, writ of error nonprossed or discontinued or injunction dissolved, including the term in which such affirmance, nonpros, discontinuance of the writ of error, or dissolution of the injunction be obtained; or in case of a surrender in discharge of bail after trial or final judgment obtained, unless plaintiff shall cause defendant to be charged in execution *within two terms next after* such surrender and notice [of which the term of the surrender shall be one], in case no writ of error be depending, nor injunction obtained for stay of proceedings; and if writ of error be depending or injunction obtained, then *within two terms next after* judgment affirmed, writ of error nonprossed or discontinued, or injunction dissolved [including the term in which either shall be done, as the case is], the prisoner shall be discharged out of custody by *supersedeas* granted as aforesaid, on filing *common bail*, unless, upon notice given plaintiff's attorney, good cause be shewn to the contrary. *Reg. Hil.* 26 *Geo.* 2. *B. R.*

In C. B. after judgment obtained against a prisoner, he must be charged *in execution within two terms*, and the term, wherein judgment is obtained is reckoned as one—or on default defendant may obtain his discharge in like manner as for not proceeding to trial or judgment. *By the old Rule, Easter*, 8 *Geo.* 1.

On shewing cause why defendant should not be discharged by *supersedeas*, the plaintiff having neglected to charge him in custody within *the two terms*, it appeared, that plaintiff's attorney had taken out a *ca. sa.* but directed it to the sheriff of *Exeter* instead of *Devon*; which being sent back, he got it rescaled, and sent it in time to an attorney, with directions to charge defendant in execution: but it arrived too late to charge defendant in time; and it appearing that there was no intention to oppress, and the delay arising entirely from an accident, the court discharged the rule. *Barnes*, 380. *C. B.*

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The plaintiff shall have every day in the second term to charge a prisoner. 2 *Wilf.* 380. *C. B.*

The writ of enquiry being set aside, because not executed before a person properly deputed by the sheriff, defendant applied for a *superfedeas* for want of plaintiff's proceeding to final judgment *within three terms* after the declaration, and obtained a rule to shew cause, which was made absolute. *Barnes*, 384. *C. B.*

The defendant, a prisoner, applied to be discharged by *superfedeas*, for want of being charged in execution *within two terms* after judgment. The plaintiff excused himself by the delivery of a *ca. sa.* to the gaoler within due time. But the court held that to be insufficient. The *ca. sa.* ought to have been delivered to the sheriff, and the sheriff's warrant to the gaoler. *Barnes*, 389. *C. B.*

Within two terms after final judgment, plaintiff, instead of charging defendant in execution, charged him with a declaration in an action of debt on the judgment. The court held this declaration vexatious, and no cause against a *superfedeas*, and made the rule for a *superfedeas* absolute. *Barnes*, 390. *C. B.*

On motion for a *superfedeas* for want of proceeding to judgment within three terms after declaration delivered, and cause shewn, it was contended, that the judgment, though not signed till *Michaelmas vacation* (*Michaelmas* being the third term), was a judgment of *Michaelmas* term, which was sufficient to prevent a *superfedeas*. *Per Cur.* The three terms are always taken to be *inclusive* of that term whereof the declaration is; and unless plaintiff proceeds to sign final judgment *within the third term*, he is too late. Rule absolute for a *superfedeas*. *Barnes*, 379. *C. B.*

The defendant was brought into court by *habeas corpus ad faciendum*, to be charged in execution; which being objected to, because a judge had before made an order for a *superfedeas*, which was lodged with the warden, and allowed, and appearance entered: but as defendant had not served the order, nor allowed the *superfedeas* till after the *habeas corpus* was lodged with the warden, the court held that he must be charged, and that he might apply afterwards as advised. The plaintiff may proceed at his peril. *Barnes*, 379. *C. B.*

The defendant in *Michaelmas term* was surrendered in discharge of his bail; and afterwards, without giving any notice to the plaintiff, was removed to the *Fleet*. The plaintiff in *Hilary*, charged him in execution as a prisoner in B. R. and afterwards, defendant moved for a *superfedeas*, upon the ground that

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that the charge in the court where he was not a prisoner signified nothing, and so *two terms* were elapsed. The plaintiff insisted he was in no default, not having notice of the removal; and that these removals do not appear on the *committitur* book, where the charge in execution is to be made. But the court granted a *supersedeas*; for the plaintiff, they said, should have demanded to see the prisoner: and if not produced, would have known where to find him, and bring him back by *habeas corpus*, to charge him. *Tilkes* v. *Allen*, *Stra.* 1153. This was before the rule *Hil.* 26 *Geo.* 3.

A prisoner who is *supersedeable* in one action at the suit of A. but not superseded, may be charged in execution in another action at the suit of A. *Barnes ad finem*, 500. *Pract. Reg.* 382. *C. B.*

If defendant, a prisoner, brings a writ of error, plaintiff has no need to charge him in execution the second term after the judgment. 2 *Wilf.* 380. *C. B.*

Plaintiffs obtained *interlocutory* judgment by *nil dicit* in an action of *assumpsit*, and sued out a writ of enquiry; but before the same was executed, became bankrupts, and proceeded to *final judgment* against defendant, a prisoner [which was regular], in *Michaelmas term*. The *assignees* then brought a *scire facias* against him, returnable the first return of *Hilary*, to shew cause why they should not have execution of that judgment; to which *sci. fa.* the defendant pleaded the whole matter stated, and the bankruptcy of the plaintiffs in bar. To which the assignees demurred and had judgment in *Easter* term. The defendant then moved that he might be discharged by *supersedeas*, the plaintiff not having charged him in execution in *Hilary*. But *per Cur.* The bankrupts could not charge defendant in execution, in last *Hilary term*, because the *assignees* were entitled to the benefit of the judgment, and had then brought a *sci. fa.* upon it. And if defendant had any land [which he may have for any thing we know], the *assignees* may perhaps choose an *elegit* against the lands, and not charge the person. Whereupon the rule to shew cause was discharged, the *assignees* having proceeded with due diligence. 2 *Wilf.* 378. *C. B.*

If a prisoner surrender after judgment in discharge of his bail, he must be charged in execution in two terms after render, except a *writ of error* is brought, or there is an *injunction*. *Note on Reg. Tr.* 2 *Geo.* 1. *B. R. Pract. Reg. C. B.* 377. But *quære* as to *injunction*, and *Vide Salk.* 322. Where, by *injunction* out of Chancery, the defendant stayed the plaintiff's execution a

year

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year and upwards. The *injunction* being diſſolved, the plaintiff took out execution without a *ſci. fa.* and this was referred to the court for irregularity. The plaintiff inſiſted that he was ſtopped by the act of the defendant; and that, if the defendant had ſuſpended it by a writ of error ſo long, he had been at liberty to take out execution without a *ſci. fa.* *Sed per Cur.* We cannot take notice of *Chancery injunctions*; and you might have taken out a writ of execution, and continued it by *vicecomes non miſit breve.* A *ſuperſedeas quia improvide* was awarded. *Booth* v. *Booth.*

Where a priſoner is diſcharged for want of proceeding to judgment, he may afterwards be taken in execution; but otherwiſe, if diſcharged for want of being charged in execution. *Pract. Reg.* 333. 2 *Vol. Rules and Orders*, 135, 6.

A priſoner diſcharged upon an inſolvent act, and afterwards arreſted for a debt exceeding the ſum limited in the act, ſhall not be diſcharged on *common bail.* *Ld. Raym.* 1088.

If the defendant is diſcharged by the *Lords act*, he cannot be retaken on execution or new action. 1 *Barnes*, 271.

A priſoner on a *capias utlagatum*, diſcharged on an inſolvent debtor's act, cannot be taken again on a new *capias utlagatum.* 1 *Barnes*, 278. *C. B.*

An action on the caſe lies againſt an attorney, for neglecting to charge a priſoner in execution in due time. Vide *the caſe of Ruſſell* v. *Palmer*, an *Att. C. B.* 2 *Wilſ.* 325. *And the caſe of Pitt* v. *Yalden. Burr.* 4 *vol.* 2060.

So if the defendant, priſoner, obtains a *ſuperſedeas* for want of plaintiff's declaring within the due time. *Ibid.*

Defendant being a priſoner in the Fleet, at the plaintiff's ſuit, brought a *writ of error*, and thereupon judgment was reverſed, and *ſuperſedeas* iſſued, to diſcharge her out of cuſtody; but before ſhe could get the *ſuperſedeas* allowed, the plaintiff charged her with a new declaration; whereupon ſhe moved to be diſcharged, and the court held, that as defendant was detained a priſoner at the plaintiff's ſuit only, and not at any other perſon's, ſhe could not regularly be charged with the ſecond declaration after reverſal of the firſt judgment, whereon ſhe had been wrongfully detained; and therefore ordered defendant to be diſcharged. *Peachy* v. *Bowes, ſpinſter.* *Barnes*, 368. *C. B.*

But where afterwards the plaintiff cauſed her to be arreſted and held to bail for the former cauſe of action, and ſhe moved to be diſcharged on a common appearance, two judges held, that as the ſecond declaration was no charge, ſhe had the bene-

fit

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fit of her *superfedeas*; and that after the judgment was reversed and annulled, the plaintiff had a right to bring a new action, and hold her to bail. But the other two judges were of opinion, that after the defendant had been discharged by rule of court, as to the second declaration, she ought now to be discharged on entering a *common appearance*; and that the rule of court amounts to the same thing as a *superfedeas*. The court being divided, no rule was made. *Sherwin* v. *Bengo, sheriff. Barnes*, 499. Though in the book the names of the plaintiffs are different, it appears clearly from the report to have been the same parties in both cases.

Defendant in the *Fleet*, being *superfedeable* for want of plaintiff's proceeding to judgment within *three terms* after declaration delivered, summoned plaintiff before a judge: whereupon plaintiff [having obtained judgment after the *three terms* were expired] immediately brought a *habeas corpus ad fat.* and charged defendant in execution. Defendant then applied to the court, and obtained a rule to shew cause why he should not be *superfeded*, for want of plaintiff's proceeding to judgment within time. Which rule afterwards was made absolute; the court being of opinion, that defendant had been wrongfully detained in custody from the time he became *superfedeable*, and that plaintiff ought not to graft a good charge on a wrongful imprisonment. *Barnes*, 398 *C. B.*

Defendant, a prisoner in the Fleet, after judgment brought a writ of error, put in bail thereon, and applied to be discharged by *superfedeas*. Plaintiff's counsel objected, that if the writ of error should be *nonprossed*, for want of transcribing the record, the bail would not be liable. But the court held, that though the record should not be transcribed, yet the bail being bound to prosecute the writ of error with effect, will be liable; and made the rule for a *superfedeas* absolute. *Barnes*, 499. *C. B.*

If after judgment the defendant is *superfeded* for want of being charged in execution, if debt be brought on that judgment, and judgment recovered thereon, the defendant may be taken in execution on such second judgment. *Ismay* v. *Dewin. H.* 15 *Geo.* 3. *C. B.* 2 *Black. Rep.* 982.

In K. B.

If the defendant, a prisoner, is in the *King's Bench* prison, in order to charge him in execution, the plaintiff must get a rule

In C. B.

If the prisoner is in the *Fleet*, you make out an *habeas corpus ad satisfaciendum*, get it signed by the prothonotary and backed by

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In K. B.

a rule from the *clerk of the rules*, and ſerve the *marſhal* with a copy, on which he will write his acknowledgment of the defendant's being in his cuſtody. Then he muſt enter a *committitur* in the *marſhal's book*, and file it. *Note on Reg. Tr.* 2 *Geo.* 1.

Upon motion to *ſuperſede* the defendant, as not being charged in execution in *two terms*, the court held, that the *committitur* muſt be actually entered on record, before the end of the ſecond term; and that there is no extenſion of the time to the continuance day after term. Nor is it ſufficient that there be an entry in the *marſhal's* book in time. *Stra.* 1215.

A *committitur* in execution was entered in the *marſhal's* book, but no *committitur* piece filed; nor was the *committitur* entered on record within two terms. Rule abſolute for diſcharging defendant on the authority of the above caſe; for the *committitur* ought to have been actually entered on record before the end of the ſecond term. *Totterell* v. *Philley. Burr. Rep.* 4 *pt.* 1841.

If the defendant is in the cuſtody of the *ſheriff*, a *ca. ſa.* muſt be ſued out, and a warrant thereon lodged with the gaoler.

In C. B.

by a judge. After which, carry it *to the clerk of the papers at the Fleet*, four days before the return, and then the defendant muſt be brought into court to be committed in execution.

If a defendant be brought into court upon an *habeas corpus ad ſatisfaciendum*, he can be charged in execution on the laſt judgment only, on which the *habeas corpus* iſſued.—If there be ſeveral judgments on which he is to be charged, there muſt be an *habeas corpus* on each,

A *habeas corpus ad ſatisfaciendum* in one cauſe only; and three judgment rolls were produced in this, and two other cauſes, by the attorney for the plaintiffs, who deſired that defendant might be charged in execution in all three. But by the judges in the treaſury, the defendant can only be charged in that cauſe wherein the *habeas corpus* is brought. There muſt be an *habeas corpus* on every judgment. *Barnes*, 223.

The ſame in C. B. but if the *ca. ſa.* be delivered to the gaoler inſtead of the ſheriff, 'tis well. 2 *Barnes*, 308.

Of

Of a Priſoner's obtaining a SUPERSEDEAS.

TO diſcharge a priſoner in any caſe, whether for want of declaring *, neglecting to proceed to judgment, or not charging him in execution, his attorney muſt take out a *judge's ſummons*, to ſhew cauſe why defendant ſhould not be diſcharged, for want of charging him (or whatever the caſe is) in due time, and ſerve the ſame on the oppoſite party; and if the plaintiff's attorney do not attend thereon, or conſent to an order being made, the defendant's attorney muſt make an affidavit of the ſervice of the ſummons, and his attendance at the time therein appointed; whereupon the Judge will make an order for the defendant's diſcharge, on filing *common bail*.

If the priſoner is in the cuſtody of the *marſhal* of the *King's Bench*, he muſt get a certificate from the *clerk of the common bails*, that *common bail* was filed with him, by order of one of the *judges*; on producing which certificate to the *marſhal*, he will diſcharge him [but ſince the rule *Hil.* 26 *Geo.* 3. *quære*, if he muſt not produce the *ſuperſedeas*?]

But if the priſoner is in the cuſtody of a *ſheriff*, &c. he muſt ſue out a *writ of ſuperſedeas*; for ſigning of which at the office, the *bail-piece*, ſigned by one of the judges, is a warrant to the officer with whom you leave it, and he delivers it over to the clerk of the *common bails* to be filed.

But in the *Common Pleas* in all caſes, whether the defendant is in the *Fleet*, or in cuſtody of the *ſheriff*, a *ſuperſedeas* iſſues, to be allowed by a *judge* to diſcharge him out of cuſtody. *Reg. E.* 8 *G.* 1.—And it ſeems ſo now in *B. R.* by the rule *Hil.* 26 *Geo.* 3.

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* But in order to diſcharge a priſoner, for want of declaring according to the rule, 2 *Geo.* 1. you muſt alſo obtain a certificate from *the clerk of the declarations*, if in *B. R.* that no *bill* is filed in his office againſt the defendant; and a certificate of the cauſes wherewith he ſtands charged, *from the clerk of the papers of the King's Bench priſon*, if in cuſtody of the *marſhal*; *and from the gaoler or turnkey*, if in cuſtody of the *ſheriff or other officer*.

Of Priſoners removing themſelves by HABEAS CORPUS from the Priſons of inferior Courts into the KING's BENCH or FLEET PRISONS.

A Priſoner in the priſon of an inferior court, will often ſue out an *habeas corpus cum cauſâ*, in order to turn himſelf over to the *King's Bench* or *Fleet Priſon*.

But if it be returned upon any *certiorari*, or *corpus cum cauſâ*, that the priſoner is condemned by judgment, he ſhall be remanded, and remain in priſon, without being let to bail againſt the will of the plaintiffs, unleſs ſatisfaction be made them of the ſums adjudged. 2 *Hen* 5. *ſtat.* 1. *c.* 2.

A defendant brought into court by *habeas corpus*, directed to the ſheriff of *G.* prayed to be committed to the *Fleet*, with the cauſes mentioned in the return, which were, 1ſt, A detainer for want of ſureties, by a warrant from a juſtice of the peace, for leaving a baſtard child, whereby a pariſh became chargeable with its maintenance.—2dly, An *excommunicato capiendo* iſſued out of *Chancery*, returnable in the *King's Bench*. And 3dly, With *Exchequer* proceſs on a recognizance forfeited at the ſeſſions.—The court remanded the priſoner, being of opinion, that as to the two firſt cauſes of detainer, they had no juriſdiction; but as to the third cauſe, the court inclined to think, that as it was not on an *extent*, the defendant might have been committed therewith abſtractly conſidered. *Barnes*, 223.

A defendant was taken in execution in the admiralty court, and wanting to procure his liberty, gets a perſon to whom he was indebted to ſue out an *habeas corpus ad reſpondendum*, in order to be turned over to the *Marſhalſea:* And being thereby brought into court, it was moved, that he might be committed to the *Marſhalſea*. *Sed per Cur.* Though upon an *habeas corpus ad ſubjiciendum*, this court, upon a charge of treaſon or felony, would have turned the defendant over to the marſhal; or if a bill had been filed againſt him, ſo that he had been in the cuſtody of the marſhal before; but yet, in this caſe, the court cannot do it, becauſe there is no plea in this court, at this time, depending againſt him: and it cannot be, becauſe he is not *in cuſtodia mareſchalli*. And he was remanded by the whole court. *Dewler* v. *Keite*. *Ld. Raym.* 789. *Salk.* 351.

So in Dr. *Watſon's* caſe, who being arreſted upon an *excommunicato capiendo*, after an excommunication in the *Spiritual Court*, for non-payment of coſts, in a ſuit in which he was condemned, was brought into *B. R.* by *habeas corpus ad reſp. J. S. de placito debiti, &c.* And on motion to be committed, he was remanded, becauſe no ſuit was depending here againſt him, the bill of *Middleſex* not being returnable till next term. *Ibid.*

If

Of Priſoners removing themſelves by HABEAS CORPUS from the Priſons of inferior Courts into the KING'S BENCH or FLEET PRISONS.

If a priſoner in the *Compter* be removed into the *King's Bench*, upon an *hab. corp. ad reſp.* and intending to go over into the *Fleet*, procures ſome friend to bring an *habeas corpus* to remove him; he ſhall not be removed thither, till he has anſwered to the cauſe here; and he ſhall not compel the plaintiff to follow after a prolling defendant; and ſo *vice verſa* of the *Common Pleas*. Each court ſhall retain the defendant in which he is firſt attached; and after he has anſwered there, you may carry him where you will. *Salk.* 350.

Actions having been entered in *B. R.* againſt one in cuſtody of a ſheriff, upon a *ne exeat regno*, an *habeas corpus* was ſaid might be granted, although ſtrongly objected to; becauſe the writ of *ne exeat regno* commands the ſheriff to take ſecurity, and tranſmit it into *Chancery*. *Sed per Cur.* The *habeas corpus* ought to be granted: The *King's Bench* may receive and judge of the ſecurity taken; and he ought to remain there, and that they may then grant a *ſuperſedeas*. *Nailor's* caſe. *Ld. Raym.* 696.

The defendant was brought to the bar by *habeas corpus*, returnable in one month from the day of *St. Michael*, to be committed to the *Fleet*; and the court committed, though the day of the return was paſt. *Barnes*, 221. *C. B.*

From the above caſes it appears, that where a priſoner is in cuſtody charged with proceſs from another court than that to the priſon of which he would be turned over, he muſt (before ever he can be turned over) procure himſelf to be charged with ſome proceſs iſſuing out of the court into the priſon of which he would be turned over, and then bring his *habeas corpus*, that he may be returned charged with ſuch proceſs.

Where any perſon ſhall be brought into court upon an *habeas corpus*, or before a judge, in order to be committed to the cuſtody of the marſhal, the writ, with the return, ſhall be left with the *ſecondary*, or *judge's* clerk, to be filed; and a copy or note of ſuch return of the writ, under the hand of the *judge* or *ſecondary*, ſhall be delivered to the marſhal at the time of the commitment of ſuch perſon to his cuſtody; and ſuch copy or note ſhall be prepared by the perſon proſecuting ſuch writ of *habeas corpus*, or by his attorney. *Trin.* 3 *Anne.*

Of Outlawry.

OUTLAWRY is a punishment inflicted on a person for a contempt and contumacy, in refusing to be amenable to, and abide by the justice of that court which hath lawful authority to call him before them; and as this is a crime of the highest nature, being an act of rebellion against that state or community of which he is a member, so doth it subject the party to divers forfeitures and disabilities; for hereby he loseth *liberam legem*, is out of the king's protection, &c. *Co. Lit.* 128. *Rol. Ab.* 802. *Dr. and Student, dial.* 2. *c.* 3.

But as to the forfeitures for refusing to appear, herein the law distinguishes between outlawries in capital cases, and those of an inferior nature; for as to outlawries in treason and felony, the law interprets the party's absence a sufficient evidence of his guilt*, and, without requiring further proof or satisfaction, accounts him guilty of the fact, on which ensues corruption of blood, and forfeiture of his whole estate, *real and personal*.

But outlawry in lesser crimes, or in *personal actions*, does not occasion the party to be looked upon as guilty of the fact, nor does it occasion an entire forfeiture of his real estate, but yet is very fatal and penal in its consequences; for hereby he is restrained of his liberty if he can be found, forfeits his goods and chattels, and the profits of his lands, while the *outlawry* remains in force. *Plow.* 941. 9 *H.* 6. 20. *b.*

Having stated the difference between *outlawry* in *criminal* and *civil cases*, I shall proceed to shew in what *civil actions* process of outlawry lies, in what manner a defendant may be prosecuted to outlawry, and how such outlawry may be avoided or reversed.

Process of *outlawry* lies in no case, but where a *capias* lies. So that when the proceedings are by *bill*, and not by *original*, as there can be no *capias* upon a bill, so there can be no process of *outlawry*. *Leon.* 329. 2 *Rol. Ab.* 76. *Sid.* 159. *Keb.* 577.

The process of *outlawry*, in *civil actions*, is considered, at this day, nothing more than a *process* to compel an appearance of the party against whom a suit is commenced; and therefore any plausible cause, however slight, will, in general, be sufficient to reverse it. But in order to make the *process to outlawry*, and *practice* therein, intelligible, it will be necessary to take a view of the statutes which have altered the *process* of the courts.

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* In lesser crimes *flight* is not a conviction of the fact, as appears by *Fleta*, 42. "*Quamvis quis pro contumacia, & fuga utlagetur, non propter hoc convictus est de facto principali.*"

The

The ſtatute 13 *Car.* 2. *ſtat.* 2. *c.* 2. being made to remedy ſome * abuſes which crept in upon authoriſing the *arreſt* of the defendant's body by the bill of *Middleſex*, *latitat*, *&c.* in *B. R.* and the general writ of *capias clauſum fregit* in *C. B.* provides, that no perſon who ſhould happen to be arreſted by force or colour of any writ or proceſs iſſuing out of the *King's Bench* or *Common Pleas*, ſhall be forced upon ſuch arreſt to give ſecurity in more than 40*l.* *unleſs the true cauſe of action be particularly expreſſed in ſuch writ or proceſs.*

This ſtatute not having remedied all the miſchiefs that prevailed, as the ſheriff was ſtill to take bail for the defendant's appearance in 40*l.* even upon a *general writ*, without the clauſe of "*ac etiam*;" and upon writs wherein the clauſe of "*ac etiam*" was inſerted, he was authorized to require bail upon the arreſt to the amount of double the ſum ſpecified therein; which was ſtill an engine of oppreſſion in the hands of a malicious and troubleſome plaintiff, as he could expreſs any ſum in the clauſe of "*ac etiam*," or lay his damages therein to any amount, and thereby keep the defendant in gaol for want of bail—the ſtatute 12 *Geo.* 1. *c.* 29. was made to give a further remedy for ſuch abuſes, and provides, "that no one ſhall be held to bail, "upon the arreſt by proceſs from the ſuperior courts, unleſs an "affidavit is previouſly made, that the cauſe of action amounts "to 10*l.* or upwards; and that where no ſuch affidavit is "made, that the party ſhall only be ſerved with a copy of the "proceſs, in order that he may appear to the action; and, in "caſe of his non-appearance at the return, the plaintiff has "liberty to enter (on affidavit made of due ſervice of the "proceſs) an appearance for him, and proceed as if the party "had actually appeared." Then came the ſtatute 5 *Geo.* 2. *c.* 27. to remedy the inconveniencies from the proceſs being in *Latin*, and required the ſame to be in the *Engliſh tongue*; and where the party is only to be ſerved with a copy thereof, when no affidavit is made of the debt's amounting to 10*l.* or upwards, enacts, "that an *Engliſh notice*, in writing, ſhall be "ſubſcribed on the copy of the ſaid proceſs wherewith the "party is to be ſerved, to the intent to warn him to appear at "the return thereof, to anſwer the action againſt him."

Theſe ſtatutes have, in great meaſure, occaſioned the practice of *outlawing* defendants to fall into diſuſe, as a plaintiff may proceed with leſs expence, and more expedition, in his action, by not taking out proceſs towards *outlawry*, than by proceeding with an intention to *outlaw*, ſhould the defendant ſtand out to be *outlawed*, the proceſs thereto being dilatory and expenſive. But ſtill a plaintiff in ſome caſes, and particularly if his action is againſt a defendant, who it is apprehended will be litigious, or

* *Vide* the Introduction.

is difficult to be arreſted, and has property wherewith to ſatisfy the plaintiff's demand, and all the charges and incidental expences of the *outlawry*, will find an advantage in this method of proceeding.

The aforementioned ſtatute of *Cha.* 2. was of equal ſervice to plaintiffs as to defendants; for a plaintiff who choſe to proceed by *original*, could inſert any cauſe of perſonal action in the clauſe of "*ac etiam*," in the *capias*; arreſt the party immediately, and require bail to the amount of double the ſum expreſſed therein; but ſtill the defendant was ſuppoſed to be arreſted for the *treſpaſs* mentioned in the writ, [though, in fact, no ſuch charge could be alledged againſt him;] and not for the debt or damages inſerted in the "*ac etiam*" clauſe, the intent of that being nothing more than to ſhew the ſheriff, to what amount he was to inſiſt upon bail if he arreſted the party.

This ſtatute of *Cha.* 2. gave a plaintiff who had an action of *debt* againſt a defendant, if he ſued by original, an opportunity alſo of avoiding the *fine* paid to the king upon ſuing out his *original writ* in *debt*, becauſe he could inſert the amount thereof in the *ac etiam* clauſe of a *capias*, and, if the defendant was arreſted, require bail in proportion to his demand; which was a cheaper method of proceeding, evidently more expeditious, and equally anſwered the purpoſe of ſuing out an *original in debt*; and going on regularly towards *outlawing* the defendant: unleſs he was a perſon likely to abſcond or avoid being taken, and had property which the plaintiff could come at to ſatisfy his debt by proceeding to outlaw him. For which reaſon we do not often hear, at this day, of a *præcipe quod reddat*, in *debt*, or of a perſon being *outlawed* in an action of *debt*, as that action is generally proſecuted in the *King's Bench* by *bill* or *latitat*, which pre-ſuppoſes a bill; and in the *Common Pleas* by a *capias*, with an *ac etiam* in it; and a defendant cannot be *outlawed* by proceſs with *ac etiams*.

Since the ſtatute alſo of 12 *Geo.* 1. *c.* 29. before mentioned, we do not often hear of a defendant being *outlawed* by a common *capias quare clauſum fregit*; becauſe, if the plaintiff's cauſe of action does not warrant him to arreſt and hold the defendant to bail, he is generally ſerved with a copy of the proceſs, with a notice ſubſcribed, to appear; and upon no appearance within *eight days* after the return of the proceſs *, the plaintiff is at liberty, upon an affidavit made of the proceſs having been duly ſerved on the defendant, to enter an appearance for him, and proceed as if he had regularly appeared to the action. This method, therefore, in caſes not warranting *bail*, if the defendant can be met with, being more eaſy and expeditious, and attended with little or no expence to the ſuitor, compared with

* *Vide* 5 *Geo.* 2. *c.* 27.

proceedings

proceedings towards *outlawry*, affords one reaſon, why *outlawry* is not often heard of now upon *common capias's quare clauſum fregit*. Another reaſon alſo is, that ſhould a plaintiff proceed with an intention to *outlaw* the defendant upon *common capias's*, and the defendant even not come in till after the *exigi facias*, he may, notwithſtanding, reverſe the *outlawry* had againſt him, without being compelled to put in *bail* to the action. So that the plaintiff, inſtead of gaining any advantage, in proceeding to *outlawry* upon *common capias's*, and not purſuing the line chaulked out by the ſtatute for his own expedition, is not only put to expence, but is himſelf the occaſion of his own delay, and frequently in a worſe ſituation towards recovering his demand than he otherwiſe might have been, if he had proceeded as the ſtatute directs him.

For the above reaſons, a plaintiff ſeldom proceeds with a view to *outlaw* the defendant, unleſs the cauſe of action is ſuch as to warrant holding him to *bail*; which muſt be for actions founded on *contract*, unleſs by ſpecial order of a judge in caſes of *torts*. And, as the action of *debt* is not often commenced at this day by a *præcipe quod reddat*, on account of the *fine* upon ſuing it out, the action of *aſſumpſit* is that in which plaintiffs uſually proceed, with a view to *outlaw* the defendant.

In the *King's Bench*, as a *writ of error* brought on a judgment by *original* there, muſt be returnable in parliament, and not in the *Exchequer Chamber*, as where the ſuit is commenced by *bill*, a plaintiff having a juſt demand againſt a litigious defendant, who is likely to put off the day of payment as long as he can, by bringing writs of error, has a proſpect therefore of getting his debt much earlier, by ſuing by *original*, than by *bill* in the *King's Bench*. And, in either court, if the plaintiff's demand amounts to a conſiderable ſum, or the defendant cannot be eaſily caught, or has property which the plaintiff can come at, he may, in the end, reap more advantage, perhaps, by taking out proceſs towards *outlawry*, than by ſuing out a common *capias quare clauſum fregit*, or a *capias* with a clauſe of "*ac etiam*" in it.

As the action of *aſſumpſit*, where the demand is ſufficient to hold to *bail*, is the action in which plaintiffs in either court uſually proceed with an intention to *outlaw* the defendant, I ſhall ſhew the method of commencing and proſecuting ſuch action, and of outlawing a defendant therein, and of his reverſing ſuch outlawry; at the ſame time it muſt be remembered, that the practice and proceedings in another action requiring bail, towards *outlawry*, would be exactly the ſame.

The *King's Bench* now hold, that unleſs the debt be 50 *l.* or upwards, a plaintiff ſuing by *ſpecial original* ſhall only have *common* coſts.

Of Proceſs towards Outlawry.

THE plaintiff's attorney, or ſpecial pleader, when the cauſe of action is above 10*l.* draws out a *præcipe* for a *ſpecial original*; which *præcipe* [if in an action on the caſe, or treſpaſs] contains the whole count or declaration, and ought to be drawn up with great accuracy and preciſion, as on it all the ſubſequent proceedings are built. The defendant's name, his degree, profeſſion, or myſtery, muſt be aſcertained and ſet forth according to the ſtatute of *additions* *, together with the town or hamlet, place and county, in which he is or was converſant.

The *præcipe*, in an action on the caſe on *aſſumpſit*, is to this effect.

Middleſex. If *A. B.* ſhall give you ſecurity to proſecute his ſuit, then put by ſureties and ſafe pledges *C. D.* late of *Weſtminſter*, in the county of *Middleſex*, *upholder*, that he be before our *lord the king*, *on the morrow of the Holy Trinity*, *whereſoever our ſaid lord the king ſhall then be in England* [or if in *C. B.* ſay, "before our juſtices at *Weſtminſter*, on the *morrow* of the *Holy Trinity*"], to ſhew wherefore Whereas, [ſo ſet forth, *verbatim*, the whole count, or declaration] to the damage of the ſaid *A. B.* of one hundred pounds, as he ſaith, *&c.*

Returnable, &c.

E. F. attorney,
1 *May*, 1780.

This *præcipe* muſt be carried to the *curſitor* of the proper county, who will thereupon make out the *original writ* †. But in *B. R.* the *præcipe* is uſually carried directly to the *filazer*, who procures the *original* from the *curſitor*, and immediately makes out the *capias*, *&c.*

The *curſitor* is paid at the rate of 2*s.* 6*d.* the firſt count, and 6*d.* for every other count contained in the *præcipe*, upon making out the *original writ*. The *filazer*, who makes out the *capias*, &c. from the *original writ*, is alſo paid after the above rate, beſides 4*d.* for filing the *original*.

If the *præcipe* is carried to the *curſitor*, before the *eſſoign day* of a term, he will make the *original* returnable on any return of the precedent term. The *original* is returned of courſe thus:

Pledges for proſecuting, { *John Doe.* *Richard Roe.*

* 1 *Hen.* 5. *c.* 5.
† Very often no *original writ* is made out at all.

It

Of Proceſs towards Outlawry.

It has been often queſtioned, whether an *affidavit* was neceſſary to be made of the *debt*, when a plaintiff ſues by *ſpecial original*, previous to the iſſuing of the proceſs. But it was determined in lord *Hardwick*'s time, *M.* 10 *Geo.* 2. *Fownes and Allen*, that proceſs of *outlawry* is not within the ſtat. 12 *Geo.* 1. *c.* 29. ſo there is no need of an *affidavit*, when the plaintiff ſues by *ſpecial original*, eſpecially as the 5 *Geo.* 2. *c.* 27. *ſ.* 5. enacts, "That no ſpecial writ, nor any proceſs ſpecially therein expreſſing the cauſe of action, ſhall be ſued forth or iſſued from any ſuperior court, where the cauſe of action ſhall not amount to 10*l.* or upwards." Since which ſtatute, as no *ſpecial* writ can iſſue where the cauſe of action is not above 10*l.* it ſeems, that, before the iſſuing of a ſpecial writ, no affidavit is neceſſary; becauſe a ſheriff, if he apprehends the party either upon the *ſpecial capias*, *alias*, or *pluries*, before he lets him go out of his cuſtody, for his own ſafety, ſhould take bail; and he can eaſily know to what amount to take bail, as the whole cauſe of action is ſpread and ſet forth in the writ. *Vide* the caſe of *Cracroft* v. *Gledowe*, *Burr.* 4 *pt.* 1482.

In C. B. it was held, that on proceſs to *outlawry*, no affidavit for bail is required by ſtatute, or the courſe of the court. *Barnes*, 322.

If the plaintiff means to proceed to *outlawry*, he has no need to wait till the *capias* is ſpent, then to take out an *alias*, and endeavour to arreſt the defendant, and after that a *pluries*; but he may, for expedition, get them all of the *filazer* at once (if there is time ſince the cauſe of action accrued to allow of the proper *teſte* and *return* to each writ), and return them ſeverally of courſe after this manner:

"The within named C. D. is not found in our bailiwick." The anſwer of

Thomas Wright, Eſq;
And
Evan Pugh, Eſq; } Sheriffs.

The *original writ* muſt have *fifteen days*, at leaſt, between the *teſte* and return. The *capias* alſo muſt have *fifteen days* between its teſte and return; and ſhould regularly bear teſte on the return day of the *original*: the *alias* alſo muſt have the ſame number of days, and ſhould bear teſte the return day of the *capias*; and the *pluries capias* muſt have the ſame number of days, and ſhould bear teſte the return day of the *alias*; whereas, if a plaintiff ſues by *original*, and does not mean to proceed to *outlawry*, the *capias* may bear teſte before the *original*, and even

Of Proceſs towards Outlawry.

before the cauſe of action accrued, ſo long as it is actually taken out afterwards; for you cannot have oyer of the *capias*, ſo as to take advantage of it. *Barnes*, 173. And ſo held in *B. R. Eaſt.* 18 *Geo.* 3.

The proceedings are exactly the ſame towards *outlawry* upon a *common capias quare clauſum fregit*, as on a *ſpecial capias*.

Upon the return of *non eſt inventus* to the *pluries capias*, proceſs of *outlawry* begins, which is the writ of *exigi facias*. In *B. R.* the *filazer* acts as the *exigenter*: in *C. B.* the *exigenter* is a diſtinct officer from the *filazer*.

The writ of *pluries capias*, when ſealed and returned, is the warrant for the *exigenter* to make out the *exigi facias* and *writ of proclamation* thereon.

Every attorney ſhall file his warrant of attorney of the term wherein any *exigent* is awarded, upon pain of forty ſhillings for every time he offends, and is attainted by due examination of the juſtices of this court; ſuch warrant to be filed upon or before the eſſoign-day of every *Trinity* term, and within twenty-one days after the end of every other term. *Hil.* 14, 15 *Car.* 2. *C. B.*

No *exigenter* ſhall receive any *pluries capias*, in order to make an *exigent* or proclamation thereon, before the ſame be ſigned or ſtamped by the clerk of the warrants, or his deputy, to the end it may appear, that the warrant of attorney is duly filed, *Hil.* 2, 3 *Jac.* 2.

Plaintiffs, who intend to proceed to *outlawry*, generally lay their action in *London*, becauſe defendants are ſooner *outlawed* in *London* than in any other place, as the county days there are more frequent.

The writ of *exigent* therefore muſt go to the ſheriff of the county in which the action is laid; as ſuppoſe *London*. But if the defendant lives in any other county, the *writ of proclamation* muſt go there (whether a county palatine, or other franchiſe in *England* or *Wales*), according to the 31 *Eliz. c.* 3. for avoiding ſecret outlawries againſt perſons having known places of dwelling.

The *exigent* ſhould bear *teſte* the *quarto die poſt* of the *pluries*. The *writ of proclamation*, by the ſame ſtatute, muſt bear the ſame *teſte* and *return* as the *exigent*.

If the *exigent* goes into *London*, as is uſual in *outlawries*, for expedition, carry it to one of the compters, where clerks attend for the purpoſe, who require the defendant, upon five ſeveral *buſting-days*; and if he does not appear upon the *quinto exactus*, he is returned outlawed.

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Upon receiving the *writ of proclamation*, the ſheriff muſt, according to the ſtatute of *Elizabeth*, make *three proclamations*, one in his county-court, one at the general quarter-ſeſſions, and the other at leaſt one month before the *quinto exactus*, at the church-door of the pariſh where the defendant lives; or, if he lives out of a pariſh, then at the church-door of the next pariſh, upon a *Sunday*, after divine ſervice; after which proclamations, if the defendant does not appear before the *quinto exactus*, he is pronounced outlawed by the *coroner*. Then the ſheriffs return the writs—the return to the *exigent* ſpecifies the five county-courts when he was exacted; and the judgment of *outlawry*—and the return to the *writ of proclamation* particularizes when and where he was duly proclaimed.

If it happens that there ſhould not be *five county-days* between the *teſte* and *return* of the *exigent*, you may, upon application to the *exigenter*, get an *alloratur* to bring in the days.

All *outlawries* pronounced, and no *proclamation* awarded and returned, according to the ſtatute, are void. *Stat.* 31 *El. c.* 3.

The ſheriff, for making the proclamation at the church-door, ſhall have 12*d.* *Same ſtat.*

No officer, in whoſe office the *exigent* ſhall be taken, ſhall take more, for making out the *writ of proclamation*, than 6*d.* *Stat.* 6 *Hen.* 8. *c.* 4.

Of appearing upon the *exigent*, &c. *vide poſt. p.* 54.

When the *exigent* and *proclamation* are returned, the proclamation muſt be filed with the *exigenter*, and the *exigent* taken to the *clerk of the outlawries*, if in *C. B.* [in *B. R.* the *filazer* executes this office alſo], who thereupon makes out a *capias utlagatum*, of which there are two ſorts, either the general or ſpecial *capias utlagatum*; the one againſt the defendant's *body*, the other againſt his body, goods, and lands, into as many counties as the plaintiff chuſes either in *England* or *Wales*.

No ſheriff, under-ſheriff, their deputies, or bailiffs, ſhall ſet at liberty any perſon arreſted upon any *capias utlagatum*, until he receive a *ſuperſedeas* according to law from the proper officer appointed. 13 *Car.* 2. *ſt.* 2. *c.* 2. *ſ.* 4.

No ſheriff, under-ſheriff, *&c.* ſhall ſet at liberty any perſon upon any writ of *capias utlagatum*, nor diſcharge the lands or goods of any perſon outlawed, without a lawful *ſuperſedeas*, under the ſeal of the court.—*Hil.* 15, 16 *Car.* 2. But *vide* the ſtatute 4 & 5 *W. & M. c.* 18. *poſt.* which empowers him to admit to bail, or take an attorney's engagement in writing to appear for him.

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IF upon the *ſpecial capias utlagatum* any goods are taken, and the defendant is not likely to put in bail to the action, or does not move to *ſuperſede* or *reverſe the outlawry*, you may get a ſatisfaction out of his goods; but if the ſame do not amount to ſomething conſiderable, ſo as to pay all the charges of petitioning, *&c.* and put the plaintiff ſomething in pocket towards his demand, it will not be worth while to proceed.

If the plaintiff, in ſuch caſe, thinks it worth his while to proceed, he muſt get the ſheriff to extend and appraiſe the goods by an inqueſt; which the ſheriff will ſummon if requeſted, the plaintiff paying the charges thereof, amounting to about two or three guineas; and if it is neceſſary, the plaintiff may take out a *ſubpœna* for witneſſes to attend and give evidence upon the inquiſition.

The inquiſition being taken, get the *capias utlagatum* returned with the inquiſition annexed, which muſt be carried, if in *B. R. to the filazer*, who acts as clerk of the outlawries, and if in *C. B. to the clerk of the outlawries*, who will tranſcribe the inquiſition, and tranſmit it into the court of *Exchequer*. Which being done, apply to a clerk in the *Remembrancer's office* for a *venditioni exponas* *, by virtue of which the ſheriff will ſell the goods. And if the money raiſed thereby exceeds not 20 *l.* the court of *Exchequer*, on motion, will order it to be paid to the plaintiff; but if it exceeds that ſum, the plaintiff muſt petition the lords of the treaſury for it, who refer it to their *ſolicitor*, to examine into the merits of the plaintiff's demand. The petition may be in this form.

To the Right Honourable the Lords Commiſſioners of his Majeſty's Treaſury.

The humble PETITION of *A. B.*

SHEWETH,

THAT *C. D.* late of ——, being indebted to your petitioner in the ſum of 100 *l.* your petitioner did, at his

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* But an eight day rule muſt be given on the back of the tranſcript, before any *venditioni exponas* can be made to ſell them; and if there are not eight days in term, the rule muſt be for the general ſeal after term. Theſe days are allowed for any one to come in and claim the goods.

very

Of obtaining Satisfaction from the Outlaw's CHATTELS.

very great charge, in *November* laſt, proſecute the ſaid *C. D.* to an outlawry; and by virtue of a *ſpecial capias utlagatum*, directed to the ſheriff of *Middleſex*, ſeveral goods of the ſaid *C. D.* were ſeized, and found by inquiſition to be of the value of 86*l.* 4*s.* which goods were afterwards ſold by the ſaid ſheriff, by virtue of a writ of *venditioni exponas*, at the ſame price and value at which they were ſo appraiſed; and the money thereupon raiſed ſtill remains in the hands of the ſheriff of *Middleſex*.

That your petitioner's ſaid debt, and the charge he has already been at in proſecuting the ſaid *C. D.* to outlawry, greatly exceed the ſum ſo remaining in the ſheriff's hands.

Wherefore your petitioner humbly prays your Lordſhips, that the money ſo levied as aforeſaid, may be paid over to your petitioner.

And your petitioner, as in duty bound, ſhall ever pray, *&c.*

A. B.

Reference thereon to the ſolicitor.

Whitehall Treaſury-Chambers, Feb. 1, 1780.

The right honourable the Lords Commiſſioners of his Majeſty's Treaſury are pleaſed to refer this petition to *William Chamberlain*, Eſq; who is to conſider the ſame; and report to their lordſhips a true ſtate of the petitioner's caſe, together with his opinion what is fit to be done therein.

Grey Cooper.

After this reference, the plaintiff muſt make an affidavit, before one of the barons of the *Exchequer*, of his debt and proceedings againſt the defendant, and the charges he has been put unto; which affidavit, with the attorney's bill, *venditioni exponas*, and return, together with a certificate of the proceedings on the outlawry, from one of the ſworn clerks of the *Exchequer*, muſt all be laid before the ſolicitor of the *Treaſury*; and if he is ſatisfied of the truth of the premiſſes, he makes his report to their lordſhips accordingly; and thereupon a warrant goes from the *Treaſury* to the *attorney general*, to conſent that ſo much of the money as remains in the ſheriff's hands, after deducting the poundage, be paid to the plaintiff towards ſatisfying the debt and coſts, on his moving the court of *Exchequer* for

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for an order for that purpose. On delivering the warrant to the *attorney general*, he gives his consent of course; then, on moving the court of *Exchequer*, an order is made for the sheriff to pay the money over to the plaintiff, which, on sight thereof, he will accordingly do.

The fees and expences in all amount to about 20*l.*

The order must be engrossed and put under seal, with a *subpœna* annexed to perform it (as in general all orders for payment of money, or where the party is ordered to perform any act must be), and the sheriff, or party personally served therewith; otherwise, an *attachment* for non-performance thereof will not be granted.

Of obtaining Satisfaction from the Outlaw's Lands.

IF the inqueſt upon a *ſpecial capias utlagatum*, find the *outlaw* ſeiſed or poſſeſſed of *lands*, the different parcels, in whoſe tenure, and of what annual value beyond reprizes the ſame amount to, muſt all be ſet forth in the inquiſition with convenient certainty. And then the proſecutor, by iſſuing writs of *levari facias* out of the Exchequer, for the ſheriff to levy the profits, and on the return thereof, by ſuing out writs of *venditioni exponas* for ſelling thoſe profits, and afterwards by petitioning to have the monies raiſed thereout paid to him in the manner before mentioned, may obtain a ſatisfaction for his debt, and coſts of the outlawry.

But if the proſecutor's debt amounts to a conſiderable ſum, and the outlaw has a *freehold intereſt* * in the lands, and does not come in and reverſe the outlawry, and there is no incumbrance prior to the inquiſition on thoſe lands, then the proſecutor may obtain a *leaſe* of thoſe lands out of the *Exchequer*, or a *grant* thereof under the *privy ſeal*. To obtain a leaſe, it will coſt the proſecutor 25*l.* or upwards; but ſuch leaſe being cheaper than a grant under the *privy ſeal*, it has a preference to the other method of proceeding.

If the proſecutor would have a *leaſe* of the lands found by the inqueſt, he may obtain ſuch leaſe by applying to the lords of the Treaſury, ſtating [in the nature of a petition] the amount of his debt, the proceeding to outlawry, and the ſubſtance of the inquiſition on the *capias utlagatum*.

On preſenting this petition, the ſecretary will make out a warrant for a *particular* to the *remembrancer* of the Exchequer; whereupon the *deputy remembrancer* will certify a *particular* of the parcels of land, and value thereof, found by the inqueſt.

This *particular* being ſigned by the *deputy remembrancer*, muſt be carried back to the ſecretary of the Treaſury, who will thereupon grant a warrant for a leaſe, which is made out at the *Pipe-office* of the court of *Exchequer*.

When the proſecutor has obtained a leaſe, if the tenants of the lands will not attorn tenants to the leſſee, and pay their rents to him voluntarily, he may ſue out writs of *levari facias* from time to time, to levy the ſame as they become due; and

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* I ſay a *freehold intereſt*, becauſe a *chattel real*, as a term for years, may be ſold by a *venditioni exponas*, but a *freehold* cannot; for an outlaw in civil caſes does not forfeit his freehold lands, but only the profits thereof during his outlawry.

when

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when returned, the *court of Exchequer*, on motion and production of the leaſe, will order the ſums levied, whether ſmall or great, to be paid over to the proſecutor, or leſſee, without any further application to the Treaſury.

Under a *leaſe*, or *levari*, the party may take the *iſſues* * and *profits* of the lands to the value extended, but neither the king, nor his leſſee, can plow the land, nor cut the wood or underwood upon it.

As to iſſues, the caſe of *Britton* and *Cole*, *Salk.* 395. *Ld. Raym.* 305. and *Com.* 51. is worthy of notice.

On a *levari facias* to levy the yearly value of 55 *l.* found by the inquiſition upon an *outlawry*, on a judgment in debt, the ſheriff took the beaſts of a ſtranger levant and couchant on the land. Treſpaſs being brought, the ſheriff juſtified under the *levari*.—The court held, 1*ſt*, That by bare outlawry the party immediately forfeits his perſonal goods, and they are veſted in the king; but he does not forfeit the profits of his lands, nor chattels real, till inquiſition taken. And therefore that an alienation after outlawry, and before inquiſition, is good to bar the king of the pernancy—but if he makes a feoffment after inquiſition, the feoffee has the eſtate, but the king ſhall have the profits. 2*dly*, That the ſheriff may well take the cattle of a ſtranger, levant and couchant, for they are the iſſues of the land, and the land is debtor: and if the law were otherwiſe, he might defeat the king of all by agiſting the land; and there is better reaſon for their being liable in this caſe than for a rent charge, which is againſt common right, and by grant of the tenant. 3*dly*, That if there be a commoner, or another tenant in common with the defendant, his beaſts may be taken on the land, unleſs the title of the commoner, or tenant in common, be found by the inquiſition: and ſo it is, of a leaſe for years prior to the outlawry, for they are bound by the inquiſition; and ſo is their title, till they avoid it by a *monſtrans de droit* brought in the *Exchequer*. 4*thly*, If iſſues be forfeited by a juror, and returned upon him, his feoffee is liable, nay, he in reverſion is liable, if the juror was only tenant for life; for this being a ſervice for the publick, the inheritance itſelf is

* What ſhall be accounted *iſſues*, vide the *ſtat. Weſtm.* 2. *c.* 39. "And let the ſheriff know that rents, corn in the grange, and all "moveables [except horſe, harneſs, and houſhold ſtuff], be contained "within the name of *iſſues*."

made

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made debtor, and charged to anſwer it: otherwiſe, of the iſſues forfeited and returned upon an outlawry. The defendant, or his heirs, feoffee or aſſigns, are liable, as claiming under the ſame eſtate which is charged with this debt, but it ſhall not charge him in reverſion or remainder; for the forfeiture ariſes from a particular default of the tenant, and not from a charge on the inheritance.

The ſheriff under a *levari*, or proſecutor by virtue of a leaſe, muſt not take more than the value *extended* by the inqueſt; but if the value is greater than found, a writ of *melius inquirendum* may go to find the full value; and ſuch a writ may alſo go, if the inquiſition is defective, and does not aſcertain the outlaw's title, or the parcels of the land ſufficiently.

Form of petition for a leaſe of an outlaw's lands, at the ſuit of a ſurviving executor.

To the Right Honourable the Lords Commiſſioners of his Majeſty's Treaſury.

The humble petition of A. B. gent. ſurviving executor of the laſt will and teſtament of C. D. merchant, deceaſed,

Sheweth,

" That E. F. of —— in the county of —— eſquire, being " indebted to your petitioner's teſtator in his life-time, by " bond, in the penal ſum of one thouſand pounds of lawful " money of Great-Britain, conditioned for the payment of five " hundred pounds, with lawful intereſt for the ſame, from the " twenty-firſt day of May, which was in the year of our Lord one " thouſand ſeven hundred and ſeventy-eight; Your petitioner, " as executor of the laſt will and teſtament of the ſaid C. D. " deceaſed, did, at very great coſts and charges, in the month " of October, which was in the year of our Lord one thou- " ſand ſeven hundred and eighty, in due manner proſecute " the ſaid E. F. to outlawry; and by virtue of a certain writ " of ſpecial *capias utlagatum*, iſſued upon the return of the writ " of *exigi facias*, againſt the ſaid E. F. directed to the then " ſheriff of ——; O. P. eſquire, then ſheriff of the ſaid " county of —— did return to the ſaid writ of ſpecial *capias* " *utlagatum*, to him directed, an inquiſition taken at the dwell- " ing-houſe of J. S. called or known by the ſign of the White " Lion in —— in the ſaid county, on the ſecond day of Ja- " nuary, in the year of our Lord one thouſand ſeven hundred

" and

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" and eighty-one; by which it was found, amongſt other " things, that the ſaid E. F. the outlaw, on the ſaid twenty- " third day of October, in the year of our Lord one thouſand " ſeven hundred and eighty, on which day he was outlawed at " the ſuit of your petitioner, as ſurviving executor of the laſt " will and teſtament of the ſaid C. D. deceaſed, *was ſeiſed for* " *the term of his natural life, of, and in all and ſingular the meſ-* " *ſuages, tenements, and hereditaments, with the appurtenances* " *herein-after particularly mentioned and expreſſed, being in the* " *whole of the clear yearly value of two hundred pounds of lawful* " *money of Great Britain, beyond all reprizes; that is to ſay, of* " *and in a capital meſſuage, or manſion-houſe, with the appurte-* " *nances, called* ——— *and three other meſſuages, or dwelling-* " *houſes, with the appurtenances thereunto adjoining, commonly* " *called or known by the ſeveral names of* ——— *and alſo of one* " *water corn griſt mill, with the appurtenances, called* ——— " *and alſo of and in two hundred acres of arable, meadow, and* " *paſture land, or thereabouts, with the appurtenances; all which* " *ſaid premiſes were ſituate, ſtanding, lying, and being, in the* " *pariſh of* ——— *in the ſaid county; and were in the tenure, poſ-* " *ſeſſion, or occupation of* ——— *and that the ſaid E. F. was,* " *on the ſaid twenty-third day of October, ſeiſed of, or entitled* " *unto, in fee ſimple, a free fiſhery of and through a certain river,* " *called* ——— *in the pariſh of* ——— *in the ſaid county; and* " *that the ſame was of the clear yearly value of ſix pounds, beyond* " *all reprizes, and was then ſet to* ——— *for that rent, as tenant* " *thereof to the ſaid E. F.* And that the ſaid outlaw was not " found in the bailiwick of the ſaid ſheriff, as by the return of " the ſaid writ of ſpecial *capias utlagatum*, now remaining of " record in his majeſty's court of *Exchequer*, amongſt other " things, may more fully and at large appear. And your pe- " titioner further ſheweth unto your lordſhips, that the ſaid " outlawry ſtill remains in full force and effect, not vacated, " ſuperſeded, reverſed, or annulled; and that your petitioner's " ſaid debt and intereſt, together with the coſts and charges " which he has already neceſſarily been put unto, in proſe- " cuting the ſaid E. F. to outlawry, amount to a large ſum of " money; that is to ſay, to the ſum of ——— and upwards. " By reaſon whereof, your petitioner hath been, and is, " wholly prevented and hindered from adminiſtering the effects " of the ſaid C. D. the teſtator, and fulfilling the duty and " truſt repoſed in him, as the ſurviving executor of the ſaid " C. D. deceaſed. Wherefore your petitioner humbly prays

" your

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" your lordships favour and interposition, that by and with " the consent of his majesty's attorney general, in this be- " half obtained, a lease may be made to your petitioner, by " and from his majesty's court of *Exchequer*, whereby your " petitioner may be enabled to levy, take, collect, and receive " the issues and profits of the said outlaw's lands, tenements, " and free fishery, so found by the said inquisition, to the va- " lue thereof, respectively appraised and extended, till such " time as sufficient thereout shall be made, collected, and " levied, to satisfy your petitioner's said debt, interest, costs, " and charges; or until such time as the said E. F. shall cause " the said outlawry, so had in due form of law against him, to " be reversed or annulled. And your petitioner, as in duty " bound, shall ever pray, &c."

If the inquest should undervalue the land, or if all the *outlaw*'s lands or effects should not be discovered at the time of taking the inquisition, or if there should be any defect in the return, a writ of *melius inquirendum* may go from the *Exchequer*; on which the sheriff must summon another inquest, and enquire more particularly, and return the inquisition, which he shall thereupon take, to the barons.

Of

Of ſuperſeding the EXIGENT before Outlawry.

IF the defendant has notice that an *exigent* is iſſued out againſt him, and would avoid the *outlawry*, he muſt find out to what ſheriff the writ is directed, and get a note of it, particularizing at whoſe ſuit, the cauſe of action, and when the *exigent* is returnable; from which note, the *filazer* in *B. R.* or *exigenter* in *C. B.* will make out a *ſuperſedeas* on the defendant's attorney entering an appearance: which *ſuperſedeas* muſt be carried to the ſheriff for his allowance thereof, before the return of the *exigent* *.

The *ſuperſedeas* is a writ taking notice of the *exigi facias* having iſſued, at whoſe ſuit, and for what cauſe; and orders the ſheriff to forbear further proceedings, as the defendant duly appeared in court before the iſſuing thereof, and offered to anſwer the plaintiff; although the fact, perhaps, is the contrary.

If the defendant thus ſuperſedes the *exigent* before outlawry pronounced, no bail is required, let the debt be ever ſo large: Whereas, if a defendant ſuperſedes or reverſes an *outlawry* had againſt him, he muſt put in bail, if he was outlawed by a *ſpecial original* requiring bail.

The *ſuperſedeas* to an *exigent* muſt be delivered to the ſheriff before the return of the *exigent*. *Barnes*, 319.

In ſuperſeding the *exigent*, the defendant muſt pay the plaintiff the coſts he has been put unto by his proceedings.

Proceedings on an *exigent poſt ca. ſa.* were ſtayed on motion, defendant, after the *teſte* and before the *return*, becoming a priſoner in the Fleet, and plaintiff left to charge him in execution. *Speed* v. *Barber*. *Barnes*, 321.

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* The fees amount to about 10*s.*—2*s.* for entering the appearance,—3*s.* the *ſuperſedeas*—duty, 1*s.* 6*d.*—ſeal, 7*d.* and allowance by the ſheriff, 2*s.* 4*d.*

Of

Of appearing to the EXIGENT, and of reverſing the OUTLAWRY by Motion on coming in GRATIS.

FORMERLY, if the defendant appeared upon the *exigent*, though the debt originally required bail, yet the defendant was not obliged to put in bail; but the courts now hold, that if the defendant ſtands out to be *outlawed*, and will then come in [*i. e.* voluntarily come in], and the cauſe of action requires bail, he muſt put in bail, as appears by *Campbell* v. *Daley*. *Bur. Rep.* 4 *pt.* 1920. The queſtion was, whether in a caſe originally requiring ſpecial bail, and the defendant ſtanding out to an outlawry, he can come in and appear to the outlawry without putting in ſpecial bail? *Per Cur.* There ought to be *ſpecial bail:* it would be unreaſonable, that a defendant ſhould gain an advantage, by ſtanding out until proceſs of outlawry. He certainly ought not to be in a better caſe then, than if he had appeared at firſt. And accordingly direction was given, "that the filazer ſhould not iſſue a *ſuperſedeas* till the defendant had put in ſpecial bail." And a week was given him for that purpoſe.

Inſtead of driving the party to a writ of error, to reverſe an outlawry had againſt him, the court will, at this day, in moſt caſes, relieve upon motion, where the party comes in *gratis* upon the *exigent*, if the proceedings have been irregular or unlawful.

A writ of *ſuperſedeas* to an *allocatur* to the *exigent* could not be ſealed in the morning of the day whereon the *allocatur* was returnable, it being an holy-day, but was ſealed and brought to the ſheriff's office in *London*, about an hour after the defendant was returned *outlawed*. The proceeding was by ſpecial original in an action on the caſe on promiſes, which required bail. Motion and rule was to ſhew cauſe, why defendant ſhould not have leave to appear, and ſuperſede the *exigent* on payment of coſts. On ſhewing cauſe, the court was not willing to ſtrip the plaintiff of an advantage which he had fairly and regularly obtained. Before a defendant is returned outlawed, he may ſuperſede the *exigent*, though founded on a ſpecial original, and though the debt be ever ſo large. But after he is returned outlawed, he cannot reverſe the outlawry without bail; who are to be abſolutely bound to pay the money, without power to render the principal in their diſcharge. Ordered, that proceedings on the outlawry be ſtayed on payment of the plaintiff's debt and coſts within a month; but in

Of appearing to the EXIGENT, and of reverſing the OUTLAWRY by Motion on coming in GRATIS.

default, the rule to be diſcharged, and plaintiff at liberty to proceed in the outlawry. *Challing* v. *Fox*. *Barnes*, 326.

It appeared that, pending the *exigent*, defendant was a priſoner in the gaol for the city of *York*, for which reaſon the court ordered the outlawry to be reverſed, without payment of coſts to the plaintiff, upon defendant's entering a common appearance. *Heely* v. *Hewſon*. *Barnes*, 321.

An outlawry had againſt a bankrupt was reverſed on motion. *Anon*. *B. R.*

The outlawry was commenced and completed, during the defendant's reſidence in *Ireland*; and, on motion, it was ordered, at his expence, to be reverſed, without bail or appearance. Where the court ſee an unlawful proceeding, they will not put the party to the expence of a writ of error, but will avoid circuity, and relieve him in a ſummary way. *Reilly* v. *O'Connor*. *Barnes*, 325.

Motion to reverſe outlawries on *common clauſum fregits*, at the plaintiff's expence, on affidavits of defendant's publick appearance and dealings, ſworn by themſelves only. *Per Cur*. Let the rule be enlarged until next term, that the plaintiff's attorney may, in the mean time, make ſatisfaction to the parties. *Barnes*, 320.

Rule to ſhew cauſe, why outlawry ſhould not be reverſed at plaintiff's expence. It appeared that two writs had been ſued out, and defendant could not be arreſted. He lived on the confines of *Surry* and *Kent*; and when the *Surry* bailiff came to arreſt him, he jumped over an hedge into *Kent*, and put the bailiff to defiance. *Per Cur*. Though the defendant is ſworn to appear publickly, yet it is plain he kept out of the way to prevent being arreſted. Rule diſcharged. But, by conſent, the debt and coſts to be paid out of the money in the ſheriff's hands; and the overplus paid to the defendant. *Holman* v. *Braſier*. *Barnes*, 320.

On motion to reverſe an outlawry, the defendant, and three others, ſwore that he was always viſible; but the court refuſed, and required poſitive affidavit, that he might have been ſerved with proceſs.

On motion to ſuperſede an outlawry, it was objected by defendant, that he was a publick viſible man; and that the return of the proclamation was bad, it importing, that proclamations

Of appearing to the EXIGENT, and of reverſing the OUTLAWRY by Motion on coming in GRATIS.

mations were made as the ſheriff was by the writ commanded, but not where or according to the form of the ſtatute. That the defendant was a publick viſible man, was denied: and it was fully proved that he abſconded; and his living was under a ſequeſtration. The court ſeemed to think, the return of the proclamation was ſufficient; but ſaid, that as to that, the defendant might bring a *writ of error*. And the rule to ſhew cauſe, why the outlawry ſhould not be reverſed, at the plaintiff's expence, was diſcharged. *Dale* v. *Robinſon*, clerk. *Barnes*, 322.

Rule to ſhew cauſe, why outlawry ſhould not be reverſed at the plaintiff's expence. Objected, on the part of the defendant, that he was a publick viſible man, and that the plaintiff had not endeavoured to arreſt him. That the *capias*, *alias*, and *pluries*, were all ſued out at the ſame time. That no affidavit of the debt was indorſed on the writs (though bailable), purſuant to the ſtatute to prevent vexatious arreſts. That no date was on the writs, as required by the ſtatute. The affidavits, as to the defendant's viſibility, were fully anſwered, and his total abſconding proved. And the court held, that in caſe of a total abſconding, no endeavours to arreſt are neceſſary. That ſuing out the *capias*, *alias*, and *pluries* together, was regular, and warranted by conſtant practice. That on proceſs to outlawry, no affidavit for bail is required by the ſtatute, or the courſe of the court, nor is a date to ſuch proceſs uſual. Rule diſcharged without coſts. *Farnworth* v. *Smith*. *Barnes*, 322.

If defendant goes beyond ſea after the *teſte* of an *exigent*, he may be regularly outlawed. 4 *Roll. Abr.* 84. *pl.* 3. *Barnes*, 321.

Three ſeveral outlawries had been pronounced above a year, and tranſcribed into the *Exchequer*,—one againſt *A.* and *B.* a ſecond againſt *A.* and the third againſt *B.* all at the plaintiff's proſecution. *Penvold* and *Roberts*, authorized by power of attorney executed by defendants, applied on their behalf, and obtained a rule to ſhew cauſe why theſe outlawries ſhould not be reverſed at plaintiff's expence, defendants at the time the writs of *exigent* iſſued, and ſtill being in parts beyond the ſeas. On ſhewing cauſe it appeared, that defendants had been abroad three years, and probably never intended to return; and it was urged, that as they ſtay abroad longer than their lawful occa-

Of appearing to the EXIGENT, and of reverſing the OUTLAWRY by Motion on coming in GRATIS.

ſion required, ſuch ſtay muſt be looked upon with a view to defeat juſtice; and conſequently, they were duly outlawed. That if not, they ought to bring their writ of error, and ſhould not be relieved by motion. The court thought it diſcretionary in them to relieve by motion, or put the parties to a writ of error, according to the circumſtances of the caſe. Courts have gone further of late years, than heretofore, on motions, as more effectually to expedite juſtice, ſave expence, and preſerve credit and characters. There is no ſufficient foundation for the court to order the plaintiff to reverſe theſe outlawries at his own expence. But as they are not ſpecial, but only common *clauſum fregits*, defendants have a right to reverſe them at their own expence, on entering common appearances and payment of coſts. Rule made accordingly. Defendants, before the outlawries were tranſcribed into the *Exchequer*, might have reverſed them, on entering common appearances, and payment of common coſts, as far as the *exigent*; but now, after they are tranſcribed, coſts muſt be paid to the time of the reverſal. *Barnes*, 324.

Defendant was outlawed while reſident at *Jamaica*, for a debt contracted in *England*, and was abroad when the proceedings to outlawry were firſt commenced. On ſhewing cauſe on a rule made, why the outlawry ſhould not be reverſed at the plaintiff's expence, it appeared, that the defendant was an abſconding perſon; and that the motion, though in his name, was not made by him, but by a third perſon; and the matter appearing to be a contention between creditors, the court would not exerciſe a diſcretionary power, ſo as to relieve the defendant in a ſummary way: The plaintiff has had no remedy for his debt: The court will not take from him the legal advantage he has got.—The defendant, if he thinks fit, may bring his writ of error. Rule diſcharged. *Barnes*, 325.

After the return of the *exigent*, but whilſt it remained in the hands of the ſheriff, and before the defendant was returned outlawed, the court made a rule, that a *ſuperſedeas* to the *exigent* ſhould be allowed on payment of coſts. *Withall* v. *White*. *Barnes*, 323.

After outlawry pronounced, defendant moved to ſet aſide the outlawry for want of proclamation. *Per. Cur.* This is not a fit matter to be determined in a ſummary way; the defendant may bring his writ of *error*. *Barnes*, 323.

Outlawries

Of appearing to the EXIGENT, and of reverſing the OUTLAWRY by Motion on coming in GRATIS.

Outlawries pronounced without proclamations, are void by the 31 *El. c.* 3.

Motion that plaintiff might reverſe an outlawry at his own expence, the defendant being in parts beyond the ſeas at the time he was outlawed. *Per Cur.* The defendant may take advantage of this by writ of error; but it is no matter of irregularity. *Blunt* v. *Beale. Barnes*, 320. *Ibid.* 319.

The plaintiff having commenced a proceeding to outlawry againſt defendant, he gave notice to the plaintiff that he had appeared, and obtained a *ſuperſedeas* to the *exigent*. Plaintiff ſearched at the *Compter* [as the outlawry was in *London*], and no *ſuperſedeas* being allowed there, defendant was returned outlawed, who moved to ſet aſide the outlawry. On ſhewing cauſe, defendant alledged, that he had entered an appearance with the *exigenter*; but that appeared to be unneceſſary, and a novel impoſition by the *exigenter*. The court held, that the *ſuperſedeas* is in itſelf an appearance, if delivered to the ſheriff before the return of the *exigent*; but that not having been done, the defendant is regularly outlawed; and the rule to ſhew cauſe, why it ſhould not be reverſed at the plaintiff's expence, was diſcharged. *Barnes*, 319.

In *C. B.* it was moved, that the plaintiff might reverſe an outlawry at his own charge, upon affidavit that the defendant was actually in the *Fleet*, in execution for the plaintiff in another ſuit, and that he knew it; and it was granted, becauſe the plaintiff ſhould have brought him to the bar by *habeas corpus*, and there have charged him with a new declaration. *Adlame* v. *Colebatch. Salk.* 495.

A writ of *allocatur* on the *exigent* had iſſued [after judgment and *ca. ſa.*], returnable the firſt return of *Michaelmas*, whereupon defendant was returned outlawed 16th of *July* preceding. It appeared, that the plaintiff died 6th of *Aug.* and that a commiſſion of bankrupt iſſued againſt defendant on the 21ſt of *Auguſt*, preceding the return of the *exigent*. Defendant obtained a rule to ſhew cauſe why proceedings ſhould not be ſtayed, which rule was diſcharged; the court being of opinion, that the writ and return muſt be filed, notwithſtanding the plaintiff's death after the outlawry: Before an actual aſſignment by commiſſioners of bankruptcy, the crown is not bound, though there is a great difference between an extent in *aid pro rege*, and an outlawry for a private perſon's debt. Here is no

Of appearing to the EXIGENT, and of reverſing the OUTLAWRY by Motion on coming in GRATIS.

foundation to tie up the plaintiff's hands; the plaintiff [meaning the repreſentative of the original plaintiff] may proceed if ſo adviſed. *French* v. *Manby*. *Barnes*, 323.

It was the practice in the *Common Pleas*, before the *ſtat.* 4 & 5 *W.* & *M. c.* 18. to allow a defendant, upon *appearance by attorney*, to reverſe the *outlawry*, and not to require an appearance *in perſon*. But in the *King's Bench*, no one in any caſe, *civil or criminal*, could reverſe an *outlawry*, without an appearance *in perſon*, till that ſtatute, unleſs where, *ex ſpeciali gracia* upon a reaſon aſſigned to the court, they indulged him to appear by attorney, as in ſickneſs, &c. *Cro. Jac.* 462. but then the entry was, that he came in perſon, "*Quod venit in propria perſona*," the law being clear, that upon an outlawry he ought to appear in perſon. Vide *Carth.* 7. *Skin.* 16. *Salk.* 496. But to remedy the inconvenience and expence attending an *appearance in perſon*, that ſtatute enacts, "That no perſon who "is or ſhall be outlawed in the ſaid court, for any cauſe, mat- "ter, or thing whatſoever [treaſon and felony only excepted], "ſhall be compelled to come in perſon into, or appear in per- "ſon in the ſaid court to reverſe ſuch outlawry, but ſhall or "may appear by attorney and reverſe the ſame without bail, "in any caſes, except where ſpecial bail ſhall be ordered by "the ſaid court."

Of

Of appearing to the EXIGENT GRATIS, and of reverſing the OUTLAWRY by WRIT OF ERROR.

THE courts, inſtead of driving the party to his *writ of error* to reverſe an outlawry had againſt him, will moſtly, as appears from the foregoing caſes, relieve him on motion, where the proceedings have been *irregular*; but in doing this, the court always require, that the defendant pay the plaintiff his coſts up to the *exigent*, unleſs where the plaintiff has proceeded *intentionally irregular*, and with a view to oppreſs. But where the defendant is driven to his *writ of error* to reverſe the outlawry, either upon coming in upon the *exigent*, *&c. gratis*, or brought in upon the *capias utlagatum*, he muſt, in all caſes, pay the plaintiff his coſts to the *outlawry*; and, where *ſpecial bail* is required, he muſt put in bail, either before error can be brought to reverſe the outlawry, or elſe upon the reverſal.

By the 31 *El. c.* 3. *ſ.* 3. it is enacted, "That before any "allowance of any writ of error, or reverſing any outlawry be "had, by plea or otherwiſe, through or by want of any pro- "clamation to be had or made, according to the form of this "ſtatute, *the defendant and defendants in the original action ſhall "put in bail, not only to appear and anſwer to the plaintiff in the "former ſuit, in a new action to be commenced by the plaintiff for "the cauſe mentioned in the firſt action, but alſo to ſatisfy the con- "demnation*, if the plaintiff ſhall begin his ſuit before the end "of *two terms* next after allowing the writ of error, or other- "wiſe avoiding of the ſaid outlawry."

This ſtatute requires *bail* to be put in before the allowance of error, only where the error is for want of *proclamations*.

But for any other cauſe than for want of *proclamations*, it is ſufficient if *bail* is put in before the reverſal of the outlawry, by the writ of error, if the original cauſe of action required *bail*.

As where error was brought to reverſe an outlawry in *Cheſter*; to which the defendant in error pleaded, that no bail was put in before the allowance of the writ of error, according to the 31 *El. c.* 3. *Per Cur.* This is no plea, for it is well enough, if bail be put in at any time before the reverſal. The error was the want of *pro comitatu*. *Wilbraham* v. *Doyley*. *Ld Raym* 605.

So where, pending error to reverſe an outlawry on *meſne* proceſs, the defendant in error moved to quaſh the writ, becauſe no bail was given. *Sed per Cur.* That is never done till the outlawry is reverſed; and then we take bail to appear to an original, to be brought within two terms. *Duckett* v. *Martin*. *Stra.* 951.

Of appearing to the EXIGENT GRATIS, and of reverſing the OUTLAWRY by WRIT OF ERROR.

If a party comes in *gratis*, upon the return of the *exigent*, he may be admitted by motion to reverſe the outlawry, for any other cauſe than want of *proclamations*, without putting in bail. If he comes in by *cepi corpus* on the *capias utlagatum*, then he ſhall not be admitted to reverſe it without appearing in perſon, as in ſuch caſe he was obliged to do at *common law*; or putting in bail with the ſheriff for his appearance upon the return of the *cepi corpus*, and for doing what the court ſhall order. Appearing by attorney is an indulgence by 4 & 5 *W. & M.* and the bail is to be ſpecial or common in this as in other caſes. *Salk.* 496. But *vide* the caſe of *Campbell* v. *Daley*, *Burr.* 4 *pt* 1920. Where it was held, that a defendant, coming in after outlawry, muſt put in *ſpecial bail*, before *ſuperſedeas* or *reverſal* of outlawry, if the original cauſe of action required ſpecial bail: which determination ſeems to have been founded on the caſe of *Serecold* v. *Hampſon*, bart. *Stra.* 1178. 1 *Wilſ.* 3. which was as follows:

The defendant was outlawed in a perſonal action, without any affidavit of the plaintiff's demand: and having brought *error*, he aſſigned his being beyond ſea at the time of the outlawry; for which the court made no difficulty to reverſe it: but the queſtion was, upon what terms they ſhould do it, the plaintiff inſiſting on ſpecial bail, and having now made a proper affidavit; and the defendant inſiſting to file common bail only. —The court, upon conſidering of the 4 & 5 *W. & M. c.* 18. *ſ.* 3. which impowers the outlaw to appear by attorney [as he did here], and ſays, it ſhall be reverſed without bail in all caſes but "where ſpecial bail ſhall be ordered by the court," declared, they were of opinion, they had a diſcretionary power to require it or not; and that the want of an affidavit before was no objection, becauſe that is only requiſite to warrant an arreſt: and here was one in time for the new action that muſt be brought. And though the 31 *Eliz. c.* 3. *ſ.* 3. is the only act that requires bail, it is not to be inferred from thence, that in other caſes it ought not to be inſiſted on, for that act makes a new error, and the bail upon it is abſolutely to pay the condemnation money.

Of

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IF a defendant was arreſted upon the *capias utlagatum*, the ſheriff could not admit him to bail, as an *outlawed* perſon is excepted out of the ſtatutes of 23 *Hen.* 6. *c.* 9. and 13 *Car.* 2. *ſtat.* 2. *c.* 2. (unleſs by *ſuperſedeas* firſt had and received for diſcharging him).

But by the 4 & 5 *W.* & *M. c.* 18. *ſ.* 4. it is enacted, "That if any perſon, outlawed in the *ſaid court* * (other than "for *treaſon* and *felony*), ſhall be taken and arreſted upon any "*capias utlagatum* out of the ſaid court, it ſhall and may be "lawful for the ſheriff who hath or ſhall arreſt ſuch perſon (in "all caſes where ſpecial bail is not required by the ſaid court) "to take an attorney's engagement, under his hand, to appear "for the ſaid defendant, and to reverſe the ſaid outlawry; and "thereupon to diſcharge the ſaid defendant from ſuch arreſt: "and in thoſe caſes, where ſpecial bail is required by the ſaid "court, the ſaid ſheriff ſhall and may take ſecurity of the ſaid "defendant by bond, with one or more ſufficient ſureties, in "the penalty of double the ſum for which ſpecial bail is "required, and no more, for his appearance by attorney, in "the ſaid court, at the return of the ſaid writ; and to do and "perform ſuch things as ſhall be required by the ſaid court; "and, after ſuch bond taken, to diſcharge the ſaid defendant "from the ſaid arreſt."

And by *ſect.* 5. it is further enacted, "That if any perſon "outlawed as aforeſaid, and taken and arreſted upon a *capias* "*utlagatum*, ſhall not be able, within the return of the ſaid "writ, to give ſecurity as aforeſaid, in caſes where ſpecial "bail is required, ſo as he be committed to gaol for default "thereof, that whenſoever the ſaid priſoner ſhall find ſufficient "ſecurity to the ſheriff, in whoſe cuſtody he ſhall be, for his "appearance by attorney in the ſaid court, at ſome return in "the term then next following, to reverſe the ſaid outlawry,

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* "*The ſaid court*," means the court of *King's Bench*; the ſtatute being made to prevent malicious informations in the court of *King's Bench*, and for the more eaſy reverſal of outlawries in the ſame court. But notwithſtanding, all perſons arreſted upon the *capias utlagatum* out of the *Common Pleas*, after outlawry there, have always been bailable ſince the making thereof, and before might have been diſcharged by a *ſuperſedeas* to the *capias utlagatum*. *Vide* ſect. 4. in 13 *Car.* 2. *c.* 2.

"and

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" and to do and perform ſuch other thing and things as ſhall be " required by the ſaid court; it ſhall and may be lawful for the " ſaid ſheriff, after ſuch ſecurity taken, to diſcharge and ſet at " liberty the ſaid priſoner for the ſame."

It is the allowed practice of the court of *Common Pleas*, to ſuffer a defendant coming in by *capias utlagatum*, the ſame term on which an *exigent* is returnable, to avoid the outlawry without writ of error, by ſhewing, that he purchaſed a *ſuperſedeas* out of the ſame court, and delivered it to the ſheriff before the *quinto exactus*, &c. or by ſhewing any other matter apparent on the record, which makes it erroneous, as the want of original, or the omiſſion of proceſs, or want of form in a writ of proclamation, &c. or a return by a perſon not appearing to be ſheriff, or a variance between the original and exigent, or other proceſs, or the want of ſuch addition, &c. as is required by the 1 *Hen.* 5.—Yet, it is ſaid, in many books, to be the conſtant courſe of the court of *King's Bench*, never to reverſe an outlawry on the *crown ſide*, either in the ſame or a different term, for theſe or other errors of a like nature, without a writ of error. 2 *Hawk. P. C.* 458. and ſeveral authorities there cited.

But in *civil caſes*, the *King's Bench*, as well as the *Common Pleas*, at this day, will generally reverſe an *outlawry* on motion, as is ſeen in the foregoing pages, without driving the party to his *writ of error*, whether he comes in in the ſame term or another, or upon the *exigent* or *capias utlagatum*. But, in relieving by motion, the court always have regard to the plaintiff's cauſe of action, and the ſituation he is in towards the recovery of his debt.

A. who was a foreign merchant, and never in *England*, was outlawed at the ſuit of *B.* in an action on ſeveral promiſes for goods ſold and delivered; and, on a *ſpecial capias utlagatum*, a ſhip, and other effects belonging to *A.* were ſeized, as forfeited upon this outlawry; and it was moved, that this outlawry may be vacated, and reſtitution awarded, upon affidavits produced and read, that the defendant was never *infra legem*, *i. e.* that he never was in *England*, and therefore could not be outlawed, becauſe that was putting him *extra legem*. *Sed per Cur.* This outlawry ſhall not be vacated upon ſuch affidavits; but the defendant may bring a writ of error; which he was compelled to do, and thereupon to put in bail to the action in which

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which he was outlawed; and then the plaintiff conſented to the reverſal. *Matthews* v. *Erbo*, *Carth.* 459. *Ld. Raym.* 349. For, unleſs the court drives the defendant to his writ of error, in ſuch caſes, a perſon might contract debts, and then go beyond ſea, and ſo be out of the reach of the law; therefore this is ſaid to be a good way to get bail of a foreign merchant.

In debt upon a bond entered into by the wife, *dum ſola*, the huſband was abroad and *outlawed*; and the wife, though ſhe appeared publickly, *waived*. On motion to ſet aſide the outlawry againſt the wife, and to reſtore her the goods taken on a *ſpecial capias utlagatum*, on affidavit that they were her ſeparate goods, the court held, that the goods muſt be taken to be her *huſband*'s goods in point of law; and that, if ſhe had any equitable right to them, ſhe muſt reſort to a court of equity: but, as ſhe appeared publickly, ſhe has been wrongfully waived; and therefore the rule was made abſolute for ſetting aſide the outlawry againſt the wife, but diſcharged as to reſtoring the goods. *Biſcoe* v. *Kennedy and his wife*, *in C. B.* 2 *Wilſ.* 127.

Defendant was taken on a *capias utlagatum* on a *Sunday*, and therefore he moved to be diſcharged, the taking being contrary to the ſtat. 29 *Car.* 2. But, notwithſtanding the court held the taking bad, they refuſed to grant an attachment, and put the defendant to take the remedy given by the ſtatute. *Oſborne* v. *Carter*. *Barnes*, 319.

Defendant was waived ſpecially on meſne proceſs, as a ſingle woman by the name of *Dunſter*; and after the *exigent*, and before the outlawry, ſhe married one *Priſeley*; and, on being taken by a *capias utlagatum*, after the outlawry, on motion, a rule was obtained to ſhew cauſe, why the outlawry ſhould not be reverſed, at her huſband's expence, on his entering a common appearance for himſelf and his wife. But the rule was diſcharged, the court refuſing to interpoſe in a ſummary way, as the marriage was after the *exigent*. *White* v. *Dunſter*. *Barnes*, 321.

H. was outlawed in two actions, one was 10*l.* the other 40*s.* and, upon reverſing the outlawry, the court took ſpecial bail for the firſt, and an appearance for the other; the recognizance was taken purſuant to the 31 *El. c.* 3. *Salk.* 496.

Two perſons were outlawed in a joint action againſt them, and one moved, that, on filing common bail, ſhe might have liberty to reverſe the outlawry. *Sed per Cur.* The writ of error,

to

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to reverſe the outlawry, muſt be brought in the name of both the parties that are outlawed; and, if one only appears, the other may be ſummoned and ſevered, and then the outlawry may be reverſed for the benefit of the party appearing only. *Symmons* v. *Bingoe and Cooke. B. R. Salk.* 496.

Defendant being arreſted on a *capias utlagatum*, the ſheriff took an attorney's engagement, under his hand, to appear for the defendant and reverſe the outlawry, *without taking ſecurity, by bond, in double the ſum for which bail was required*, purſuant to the act of 4 & 5 *W. & M. c.* 18. On ſhewing cauſe, why an attachment ſhould not iſſue againſt the ſheriff for diſcharging the defendant out of his cuſtody, it was urged, that he neither did nor could know, that it was a caſe requiring bail, as the *capias utlagatum* was not marked for bail; and that 12 *Geo.* 1. *c.* 29. required an affidavit; and that the ſum, for which bail is to be taken, is to be marked on the proceſs, *&c.* For the plaintiff, it was urged, that proceſs of outlawry is not within the ſtat. 12 *Geo.* 1. that this was by *ſpecial original*; and the cauſe of action was expreſſed in the *original proceſs*, in which it appears he was entitled to bail.—The court were clear, that this was not a caſe within the 12 *Geo.* 1. and thought the ſheriff had acted improperly; but, as there was an affidavit of the under ſheriff, that he had acted to the beſt of his underſtanding, without any ill intention, they enlarged the rule in order to give the ſheriff an opportunity to *put in bail.* After which the ſheriff undertook to pay the debt and coſts. *Cracraft* v. *Gledowe. Burr.* 4 *pt.* 1482.

A. owed money to B. on judgment, and to C. on a bond. A. was outlawed at the ſuit of the obligee, and his lands ſeized on the outlawry; and the queſtion was, whether the conuſee of the judgment could extend theſe lands; and it was held the outlawry ſhould be preferred, and that the King's hands ſhould not be amoved, unleſs the conuſee could ſhew covin and practice between the obligor and obligee. *Salk.* 495.

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AN action on the caſe lies for the eſcape of a priſoner outlawed. *Stra.* 901. *i. e.* A *qui tam* action on the caſe, if outlawed on meſne proceſs; the plaintiff having an intereſt and a damage, and the king an intereſt for the forfeiture.

But if outlawed, after judgment, it ſeems *debt* lies for the eſcape at the ſuit of the plaintiff only. *Vide Cro. El.* 706.

Upon the reverſal of outlawry, the party is reſtored to all he has loſt.

If the goods of a perſon outlawed are ſold by the ſheriff, upon a *capias utlagatum*, and after the outlawry is reverſed, he ſhall be reſtored to the goods themſelves; becauſe the ſheriff was not compellable to ſell thoſe goods, but only to keep them to the uſe of the king. 5 *Co.* 90. *Hoe's* caſe. *Roll. Ab.* 778. *S. C. cited. Cro. El.* 278. *S. P. adjudged.* And *vide* 2 *Jon.* 101. 2 *Show.* 58. *pl.* 52. 3 *Keb.* 871. There ſhall be a reſtitution of profits actually paid into the *Exchequer*.

At common law, goods and chattels only were liable in perſonal actions; and as proceſs of outlawry, in perſonal actions, was given by ſtatute, goods and chattels only ſtill remain liable, becauſe they were only chargeable in perſonal actions, *i. e.* They are forfeited to the king, and he ſhall have the pernancy of the chattels real; but this is by conſequence only—the party being *extra legem*, is thereby become incapable to take the profits himſelf.

A *writ of error* to reverſe an outlawry in any civil caſe, is not often heard of now, as the party generally comes in and reverſes it by motion, and ſatisfies the debt and coſts, or juſtifies bail to appear to a new original; or, if ſpecial bail is not required, enters a common appearance; in which caſe the outlawry is reverſed of courſe before a judge, or in court, by confeſſion of ſome trifling error in the proceedings; as, the omiſſion of any letter, irregularity in any of the proceſs, want of proper addition, want of proclamation, want of filing the writ of proclamation, or, in ſhort, any trifling matter whatever; which, in ſuch caſes, is uſually confeſſed by the plaintiff. For, as the intent of proceeding to outlawry is anſwered, either by the payment of the debt and coſts, or by having good bail put in to ſtand the event of the action, any objection to the reverſal of the outlawry would be idle and nugatory.

In order to reverſe an outlawry, without an actual *writ of error*, the defendant's attorney (having entered an appearance) gets

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gets a copy of an *exigent*, on which is uſually marked the error; which being pointed out to the *ſecondary* or *prothonotary*, and then ſhewn to one of the judges, if in court, or to a judge at chambers, a certificate is made thereof, if in court, or an order, if before a judge, to the clerk of the outlawries of the ſaid reverſal.—On ſight of which order or certificate, the clerk of the outlawries marks the outlawry book, diſcharged; and then the reverſal is drawn up in paper, and entered upon the roll, and the defendant is thereupon reſtored *in ſtatu quo prius*.

This is the uſual way where a perſon is outlawed, and neither his body, goods, or lands, ſeized upon the *capias utlagatum*. But if his body, goods, or lands be ſeized, then his attorney muſt go to the *clerk of the errors*; and on putting in *ſpecial bail*, if requiſite, he will make out a *ſuperſedeas* to diſcharge the perſon or his effects, if taken, or if not taken, then for the ſheriff to forbear. But if a man be outlawed after judgment, a reverſal in the manner before mentioned will not be allowed; for an outlawry after judgment cannot be reverſed till the plaintiff hath acknowledged ſatisfaction on record, or the defendant hath paid the money into court.

When a defendant, to reverſe an outlawry, is obliged to ſue out an *actual writ of error*, he muſt apply to the proper *curſitor* for the writ; who, on a *præcipe* given him, will make out the writ, which is to this effect:

England, to wit. *George* the Third, by the grace of *God*, *&c.* To our juſtices *aſſigned to hold pleas before ourſelf*, greeting. Becauſe in the record and proceeding, and alſo in the pronouncing the outlawry againſt *C. D.* late of *London*, *merchant*, in a plea of *treſpaſs on the caſe*, whereon he is outlawed in *London*, pronounced before us returned, as it is ſaid, a manifeſt error hath happened, to the great damage of him the ſaid *C.* as by his complaint we have underſtood. We being willing the error, if any hath been, ſhould be duly corrected, and full and ſpeedy juſtice done to the ſaid *C.* in this behalf, command you, that if the outlawry aforeſaid is returned before us, as it is ſaid, then, the record and proceedings aforeſaid being inſpected, you further cauſe to be done therein, for the error and vacating of the outlawry

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lawry aforeſaid, what of right, and according to the law and cuſtom of *England*, ſhall be meet to be done.

Witneſs ourſelf at *Weſtminſter*, this ——— day of ——— in the twentieth year of our reign.

When the writ of error is duly made out and ſealed, the defendant muſt get it allowed by the court, on which allowance the *allocatur* is ſubſcribed.

If the error is in the *exigent or return*, *or allocatur*, or in the writ of *proclamation or return thereto* [having firſt put in bail according to the ſtatute], or in any of the proceedings, he gets a copy thereof, and ſpreads the whole record, and aſſigns the errors in this manner:

Afterwards, to wit, on ——— next after ——— in this ſame term, before the lord the king, at *Weſtminſter*, comes the ſaid *C. D.* by ——— his attorney, and immediately ſays, that in the pronouncing of the outlawry aforeſaid, there is manifeſt error in this, to wit, that the return of the ſaid writ of *exigi facias*, and alſo the ſaid writ of *allocatur*, are inſufficient, invalid, and void in law; therefore, in that, there is manifeſt error: There is error alſo in this, that no judgment of outlawry, upon the writ of *allocatur* aforeſaid, is returned; therefore in this there is manifeſt error [and ſo on, aſſigning the error or errors, as they happen to be]. And the ſaid *C. D.* prays the writ of our lord the king, to warn the ſaid *A. B.* to be before our lord the king, to hear the record and proceedings aforeſaid. And it is granted to him, *&c.*

If the plaintiff does not appear and confeſs the errors, the defendant muſt ſue out a *ſcire facias ad audiendum errores*, &c. and upon two *nihils* returned, the court will reverſe the outlawry of courſe: But if the plaintiff comes in voluntarily, or upon a *ſcire feci*, and does not confeſs the errors aſſigned, but joins in error, the defendant muſt make up *error books*, and proceed to argument and judgment, as in other caſes of error; of which vide *poſt.* title *Error*.

One of the defendants was arreſted on a *capias utlagatum*.—The ſheriff admitted him to bail, and on being ruled to return the writ,

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writ, returned *cepi corpus*. On which plaintiff ruled the ſheriff to bring in the body.—The bail came to juſtify. Plaintiff oppoſed their juſtification to the *original action*, inſiſting that the *coſts* of the *original action* muſt be firſt paid, and that the bail muſt be put in to a new *original*, according to the ſtatute 31 of *Eliz.* for both defendants, and not bail to the *original action*, which was now ended. And the court refuſed their juſtification, and on motion the court granted an attachment againſt the ſheriff. *Philips and others* v. *Warburton and Randal*, *B. R. Mich.* 26 *Geo.* 3.

But if the ſheriff who admits to bail in ſuch caſe as above be out of office, a *diſtringas* iſſues inſtead of an *attachment*.

Of declaring after the Outlawry reverſed or ſuperſeded.

UPON the reverſal or ſuperſeding of the outlawry, if the defendant does not pay the plaintiff his debt and coſts, the plaintiff muſt proceed to declare, the defendant having, upon reverſing or ſuperſeding the outlawry, put in *ſpecial or common* bail, as the caſe required, to appear to a new *original*.

Upon appearing and ſuperſeding the *exigent*, the plaintiff muſt declare within *ſix* or *eight* days after, otherwiſe the defendant may give him a rule to declare; and if no declaration comes in within the limited time, the defendant may non-ſuit the plaintiff, and have his coſts taxed. *Compl. Sol. C. B.* 84.

So if the defendant appear by *ſuperſedeas*, and will not take a declaration, the plaintiff may have judgment againſt him, by *nil dicit*. *Ibid.*

But where a defendant outlawed, cauſes the ſame outlawry to be reverſed, the plaintiff has till the end of the ſecond term after reverſing the ſame, and notice thereof given, to declare in. But if he does not proceed within two terms next after notice of reverſing the outlawry, the defendant ſhall have his coſts to be taxed. *Reg. Tr.* 33 *Car.* 2. *C. B.*

The declaration, after reverſal or ſuperſeding of the outlawry, has no need to be laid in the ſame county in which the former original was made. So held on demurrer. 3 *Lev.* 245. *Whitwick* v. *Hovenden*. Where the original and outlawry were in *London*, and on the reverſal of the outlawry, the plaintiff declared in *Suſſex*; on which it was inſiſted, that the original being laid in *London*, the plaintiff could not declare in the action in another county, though the cauſe of action was tranſitory. But the *prothonotaries* certifying, that the courſe of the court was, that although the *original* be laid in *London*, for expediting the outlawry, yet when the defendant comes in, the plaintiff may declare againſt him in any other county, be the action local or tranſitory. And the *ſtat.* 21 *Jac.* 1. *c.* 16. *ſ.* 4. giving the plaintiff generally a power to commence a new action or ſuit within a year after the outlawry reverſed, the plaintiff may do it in this caſe, to warrant his declaration delivered within the courſe of the court. And the plaintiff had judgment.

By the 21 *Jac.* 1. *c.* 16. *ſ.* 4. it is enacted, "That if in any action brought by original, the defendant be outlawed, and ſhall after reverſe the outlawry; that then the plaintiff, his

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heirs, executors, or adminiſtrators, as the caſe ſhall require, may commence a new action or ſuit from time to time, within a year after ſuch judgment of outlawry reverſed, and not after."

And by the 31 *Eliz. c.* 3. *ſ.* 3. it is enacted, "That before the allowance of any writ of error, or reverſing of any outlawry, be had by plea or otherwiſe, through or by want of any proclamation to be had or made according to the form of the ſaid ſtatute, the defendant in the *original* ſhall put in bail, not only to appear and anſwer to the plaintiff in the former ſuit, *in a new action to be commenced by the ſaid plaintiff for the cauſe mentioned in the firſt action* *, *but alſo to ſatisfy the condemnation, if the plaintiff ſhall begin his ſuit before the end of two terms next after the allowing the writ of error, or otherwiſe avoiding of the ſaid outlawry.*"

Though this latter ſtatute relates only to the reverſing the outlawry through want of *proclamation*, and diſcharges the bail in ſuch caſe given, if the plaintiff does not proceed within *two terms* after the reverſal—yet the recognizance of bail, upon the reverſal of outlawry for other cauſes than for want of proclamations, has moſtly been taken ſince the making thereof according to this ſtatute. Therefore, if the plaintiff does not declare after the reverſal of the outlawry within *two terms*, the bail are diſcharged. But though they are diſcharged from their recognizance, the plaintiff is not barred of his action, provided he commences the ſame within a year after the reverſal of the outlawry, according to the 21 *Jac.* 1. *c.* 16. *ſupra.*

Bail upon the reverſal of outlawry, cannot render their *principal* in diſcharge of themſelves, for they are abſolutely bound to pay the condemnation money.

Defendant was outlawed on a ſpecial original, and upon reverſing the outlawry, put in bail, with condition as uſual, to appear to a new original, to be filed within two terms. Plaintiff proceeded to judgment, and defendant brought a writ of error; a motion was made on behalf of the bail, to diſcharge

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* On this ſtatute it is, that *caſe* will lie for the party againſt the ſheriff, for an eſcape upon an outlawry on *meſne proceſs*: for though the party is in cuſtody merely at the ſuit of the king, and the plaintiff has no intereſt in his body, yet he cannot have his outlawry reverſed without ſecurity firſt given to appear to a new original. *Fitzg.* 265. *Cro. El.* 652. *S. p.*

their

Of declaring after the Outlawry reverſed or ſuperſeded.

their recognizance, no original having been filed within the two terms; and a rule made to ſhew cauſe, which was diſcharged. The bail may plead as they ſhall be adviſed. *Carleton* v. *Wilkinſon*. *Barnes*, 86.

Upon ſuperſeding the exigent, if plaintiff delivers a declaration, there ſhould be a notice to plead; and a rule given to plead before judgment, for want of a plea, can be ſigned. And defendant has, in ſuch caſe, the ſame time to plead as in other caſes. *Barnes*, 271, 272.

Of Reſtoration after OUTLAWRY reverſed or determined.

EVERY *outlawry* determines upon the death of the party outlawed; and if the party was outlawed on a civil ſuit, the repreſentatives of the outlaw, ſhall have a reſtoration of the lands ſeized, or effects, if they remain in the ſheriff's hands not diſpoſed of. Whereas in *criminal* caſes outlawry works an entire forfeiture of the outlaw's eſtate, both *real and perſonal.*

But though *outlawry* determines upon the death of the outlaw, yet before the king's hands can be removed from the lands or goods ſeized, ſuch death muſt be pleaded, and judgment entered up thereon in the *Exchequer*, upon the plea being confeſſed by the attorney general. And in like manner, if the outlawry is reverſed [which muſt be done in the original court where the action was brought] for any other reaſon, a *certificate* of ſuch reverſal from *the clerk of the outlawries* muſt be pleaded and confeſſed, and judgment entered up thereon in the *Exchequer* before the king's hands can be removed.

In order to reverſe an *outlawry* on death, there muſt be a certificate from the miniſter of the pariſh, where the party died or was buried; and likewiſe an *affidavit* of his death, by ſome perſon that was acquainted with him, and was preſent at the death or burial, in which *affidavit* the party ſhould be deſcribed as in the outlawry.

Theſe proceedings are in the nature of a *ſuggeſtion upon the roll* in the court of *Exchequer*.—The judgment by the barons in ſuch caſe is, "That his majeſty's hands be removed from the "poſſeſſion of the premiſes in the inquiſition mentioned.—And "that the ſaid A. B. [the repreſentative or outlaw, as the caſe "is] be reſtored to his poſſeſſion thereof, together with the "rents, iſſues, and profits thereof, which have not as yet "been anſwered to his ſaid majeſty; *and that the ſaid leaſe, in "form aforeſaid* made, *be void and of no effect* *; and that, as "well the ſaid R. S. late ſheriff of the county of —— as all "others who have been, now are, or hereafter ſhall be ſheriffs "of the ſaid county, ſhall be diſcharged in their accounts to-"wards his ſaid majeſty, his heirs and ſucceſſors, as well of "the rents and profits of the ſaid premiſes, as of the ſaid "annual rent of —— which have not been anſwered his ſaid "majeſty; and laſtly, that the ſaid A. B. as to the ſaid pre-"miſes, may be diſmiſſed the court, by reaſon of the ſaid "confeſſion, and other the premiſes."

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* In caſe a leaſe has been granted by the *Exchequer*.

The

Of Reſtoration after OUTLAWRY reverſed or determined.

The plea may be put in by any perſon: for though the judgment is that he ſhall be reſtored to the poſſeſſion of the premiſes, yet it gives no title to the lands.

In order to diſcharge the ſheriff, the judgment-roll muſt be carried to the *pipe-office*, that a *quietus* may be made thereupon.

If after ſuch judgment any difficulty attends the getting poſſeſſion, a writ of *amoveas manus* muſt be ſued out of the *Exchequer*, directed to the ſheriff, who will thereupon deliver poſſeſſion.

A merchant having 500 *l.* ſtock in the India company, was outlawed before judgment at the ſuit of W. R. The king, after inquiſition and ſeizure, upon petition, granted the 500 *l.* ſtock to ſaid W. R. and that he might ſue for it in his name. W. R. thereupon got the ſtock transferred to him, and then the merchant reverſed the outlawry, and obtained reſtitution *de omnibus quibus nobis non eſt reſponſum.* And on queſtion, whether he ſhould have the ſtock back, the court held that W. R. ſhould not reſtore it, becauſe the grant was executed and veſted in W. R. and as to that matter the king was anſwered — *Vide* 2 *Lev.* 49.

Of Scire facias.

A *Scire facias* is a writ *judicial*, founded on ſome matter of record; as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them, or to vacate or ſet them aſide: and though it be a writ *judicial*, or of execution, yet it is ſo far in nature of an *original*, that a defendant may plead to it, and is in that reſpect as an action; and therefore it is held, that a releaſe of all actions, or of executions, is a good plea in bar to a *ſcire facias*. *Vide Bac. Abr.* 4 *Vol.* 409. and authorities there cited.

A *ſcire facias* lies for many purpoſes in law, the writ being formed according to the ſubject matter. But the writs of *ſcire facias*, which will be proper to be noticed in this work, are only of *four kinds*.—1. Of the *ſcire facias* againſt bail, after judgment had againſt the principal, on their recognizance forfeited. 2. Of the *ſcire facias* to revive a judgment, by and againſt the ſame identical parties to the ſuit on which the judgment was had. 3. Of the *ſcire facias* to continue a ſuit, by or againſt the repreſentatives of one of the parties dying *before* final judgment. And 4. Of the *ſcire facias* by or againſt the repreſentatives of a party to the ſuit dying *after* judgment, and *before* execution.

The writ of *ſcire facias* is adapted to the ſubject matter: For the various ſorts of which writ, ſee the ſeveral books of entries.

Of the SCIRE FACIAS againſt Bail, and of Proceedings therein.

WHEN a defendant is admitted to *bail* by the court where the action is brought, his ſureties or bail ſtipulate, that the defendant ſhall, if he be condemned in the action, ſatisfy the plaintiff his debt and coſts; or elſe, that he ſhall ſurrender himſelf a priſoner; or in caſe he does neither, that they (his bail) will pay what the plaintiff recovers for him. Therefore after the plaintiff has recovered judgment in his action, he muſt, before ever he proceeds againſt the bail, look to ſatisfaction from the defendant; and the plaintiff has his election of three ſorts of executions, either of which he is at liberty to purſue againſt the defendant, *viz.* by *elegit* againſt his lands and goods; by *fieri facias* againſt his goods only; or by *capias ad ſatisfaciendum* againſt his body; by which writ, he may be impriſoned till ſatisfaction is made.—If the plaintiff proceeds by *elegit* or *fieri facias*, he aims at a ſatisfaction by a ſeizure of the defendant's property; and by taking out either of thoſe writs of execution, he cannot fix the bail; but if he would look to the bail to make him ſatisfaction, his execution muſt be by a *capias ad ſatisfaciendum* againſt the principal; and that is the only writ which has effect to fix the *bail*, as it amounts to a demand on him to ſurrender himſelf a priſoner; which if not done by the return thereof, or if he is not ſurrendered by the bail in diſcharge of themſelves, it is preſumed that the bail are ready to pay the debt and damages recovered.

If the plaintiff therefore would ever reſort to the *bail*, his execution muſt be by *capias ad ſatisfaciendum* againſt the principal; for then he ſhews, that he would have the body till ſatisfaction is made him; which writ of *ca. ſa* muſt be returned by the ſheriff, with a *non eſt inventus*, for the bail are liable only on failure of their principal.

In the court of *King's Bench*, the courſe is always to enter *recognizances* as taken in court, though actually by a judge at his chambers; and in that court they are not taken in a ſum certain, as in the *Common Pleas*; neither are they records till entered.

But in the *Common Pleas* they are records immediately upon the firſt caption, and bind the lands before filed at *Weſtminſter*; and when filed, they are records in court; and a *ſcire facias*, or *debt*, lies upon them either in *Middleſex* where filed, or in *London* where taken; whereas in the *King's Bench*, a *ſcire facias*, or action of *debt* thereon, muſt be brought in *Middleſex*..

When a defendant, againſt whom a judgment has been had, renders himſelf, or is ſurrendered by his bail in their diſcharge,

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notice of ſuch ſurrender ſhould be immediately given to plaintiff's attorney, and an *exoneretur* entered on the bail-piece; for unleſs ſuch notice is given, and the bail-piece diſcharged before the return of the *ca. ſa.* the bail are fixed with the debt and coſts in point of law.

When the recognizance is forfeited by the defendant's not being ſurrendered by his bail, or ſurrendering himſelf to priſon, the plaintiff may either bring his action of debt on the *recognizance*, or proceed by *ſcire facias*, by which the ſheriff is commanded to make known to them the judgment recovered, and the force and effect of their recognizance entered into, that the defendant has not ſurrendered himſelf to the priſon of the marſhal of the *Marſhalſea* or *Fleet*, as the caſe is; and therefore, that they appear in court and ſhew cauſe, why the plaintiff ſhould not have execution againſt them, for his debt and damages recovered.

A *ſcire facias* was brought againſt three bailees or ſureties, upon a recognizance acknowledged by them and the principal *jointly*; and on *demurrer* thereto, the writ abated; becauſe this being founded on a record, the plaintiff ſhould ſet forth the cauſe of the variance from the record, as that one was dead. But if an action is brought upon a joint bond, againſt three only, where there are four or five obligors, there the defendants ought to ſhew that it was made by them and others in full life, not named in the writ; becauſe the court ſhall not intend that the bond was ſealed and delivered by all that are named in it; and therefore the defendants cannot demur upon it, though it be entered in *hæc verba*. *Allen* 21.

In order to ground the proceedings by *ſcire facias* againſt the bail, the plaintiff, before he ſues out the writ of *ſcire facias*, muſt enter the recognizance of bail on a roll, carry in the ſame, and docquet it; ſo he muſt if he proceeds by action of debt on the *recognizance*. The entry on the roll is to this effect in *B. R.*

Michaelmas term, 20th *George* the Third (the term the declaration is of).

Middleſex ſſ. *A. B.* complains againſt *C. D.* &c. [go through the declaration], and the ſaid *C. D.* by *John Palmer*, his attorney, comes and defends the wrong and injury, when, &c. and thereupon *E. F.* of *Charing-croſs*, in the county of *Middleſex*, mercer; and *G. H.* of *Fleet ſtreet*, in the city of *London*,

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London, grocer [deſcribing the bail as in the recognizance], came into the court of our lord the king, before the king himſelf, at *Weſtminſter*, in their proper perſons, and became pledges and manucaptors, and each of them became pledge and manucaptor for the ſaid defendant, that if it ſhould happen that the ſaid defendant ſhould be condemned in the plea aforeſaid, then the ſaid manucaptors granted, and each of them did grant, that all ſuch damages, coſts, and charges* [if the action be in debt, and judgment be recovered on a verdict, ſay, did grant, that as well the ſaid debt, as all ſuch damages, coſts, and charges—or if in debt, and judgment was by default, ſay, did grant, that as well the ſaid debt, as all damages], as ſhould be adjudged to the ſaid plaintiff in that behalf, ſhould be made of their and each of their lands and chattels, and to be levied to the uſe of the ſaid plaintiff, if it ſhould happen that the defendant ſhould not pay the ſaid plaintiff, or render himſelf on that occaſion, to the priſon of the marſhal of the *Marſhalſea* of our ſaid lord the king, before the king himſelf.

The docquet-paper—— "the entry of *Joſeph Lyon*, gentleman, one, *&c.* of *Michaelmas* term 20th of *George* the Third."

Middleſex ſſ. Recognizance of bail for *C. D.* at the ſuit of *A. B.*

Roll 273.

When the entry of the recognizance is made up, and the roll docquetted and carried in, and a *capias ad ſatisfaciendum* alſo ſued out, and got returned by the ſheriff, with a *non eſt inventus*, the recognizance thereby being forfeited [becauſe there is a default in the party], the plaintiff may ſue out a *ſcire facias* againſt the bail. But though the recognizance be abſolutely forfeited in law, yet the bail may ſurrender the principal afterwards, and the court, *ex gratiâ*, on motion, will relieve the bail, as will be ſhewn hereafter.

* In *B. R.* where the ſuit is by *bill*, the bail are not bound in a ſum certain, but only undertake that the defendant ſhall pay the condemnation money, or render his body to priſon; and the recognizance being general, muſt be reduced by the judgment to a certainty. But in *C. B.* the bail are bound in a ſum certain, upon condition, that if the defendant be condemned in the ſaid action, he ſhall pay the condemnation money, or render himſelf a priſoner to the *Fleet* for the ſame; or upon failure thereof, that they will do it for him.

If

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If the plaintiff has not ſued out a *ca. ſa.* againſt the principal, in order to ground his proceedings by *ſcire facias* againſt the bail, within a year after the judgment obtained, a *ſcire facias* ſhould firſt go againſt the principal to revive the judgment, before a *ſcire facias* goes againſt the bail on their recognizance; but the bail cannot take advantage of this. *Raym.* 1096. 6 *Mod.* 304. *Holt*, 90.

On ſhewing cauſe againſt a motion to ſet aſide proceedings againſt bail as irregular, no proceedings having been had for upwards of *three years*, till the ſuing out the *ca. ſa.* and *ſci. fac.* of which a term's notice had not been given purſuant to the rule *Eaſt.* 13 *Geo.* 2. *C. B.* it appeared, that the defendant had become bail for his ſon in an action of covenant, of which judgment was had for 760 *l.*; after which a compromiſe had been entered into; in purſuance of which the father had paid 260 *l.* and the ſon was to have three years to pay the reſidue in. The ſon had obtained an injunction againſt the plaintiff, who, at the end of three years and a half, not being paid, applied to the father, as bail, for payment: which he refuſed, and ſwore he would make his ſon a bankrupt. On which plaintiff moved to diſſolve the injunction, which done, he ſued out a *ca. ſa.* againſt the principal; and on *non eſt invent.* returned, ſued out two *ſci. fac's*, and on *nihils* an execution by *fi. fa.* againſt the bail. The court held, that the bail was the principal agent, and conuſant of the whole tranſaction, ſo no ſurprize. That an agreement to ſtay for a time, to enable defendant to pay the debt, in default of which plaintiff was to proceed, was in its nature an exception out of the rule; and that at the expiration of the time, the proceedings might be renewed without a term's notice; elſe it would be, in effect, a ſtay of proceedings for a whole term beyond the time agreed on; and diſcharged the rule with coſts. *Watkins* v. *Hayden*, 2 *Blackſ. Rep.* 762.

A *ſcire facias* does not lie againſt bail, unleſs a *ca. ſa.* is ſued out, returned, and filed; but it may be filed after the *ſcire facias* iſſues. 1 *Lev.* 225. Note on *Reg. Eaſt.* 5 *Geo.* 2.

A *ſcire facias* iſſued againſt the bail in B. R. teſted 23d of June; returnable 30. It was left in the ſheriff's office 25th of June, and the ſame day a warrant iſſued, but it was not ſerved on one of the bail till the 29th, and not on the other till the 30th in the morning, being the laſt day in term. No *ca. ſa.* was returned and filed till the 31ſt, as it ought to have been. The bail on the laſt day of the term, viz. June 30th,

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after the riſing of the court, ſurrendered their *principal*, and afterwards moved that an *exoneretur* might be entered on the bail-piece, and proceedings ſtaid againſt them. But the court diſcharged the rule with coſts, holding the return, and filing of the *ca. ſa.* to be mere matter of form, if it is properly teſted, and made returnable, and lies in the ſheriff's office the uſual time, and is afterwards returned *non eſt inventus*.—And they held the ſhortneſs of the notice to the bail immaterial. *Hunt* v. *Cox.* 1 *Blackſ.* 393.

Motion to ſtay proceedings on a *ſcire facias* againſt bail, they not being ſerved with a copy of the ſheriff's warrant, which recites the writ *verbatim*. But the one by giving him a perſonal ſummons, and reading to him the ſheriff's warrant: the other by leaving a memorandum (containing the ſubſtance of the writ) with his wife, at his houſe, in his abſence. It appeared (on enquiry of the officers) that it is uſual, in *Middleſex*, to ſerve the bail with a copy of the ſheriff's warrant; but not ſo in many other counties, and this aroſe in *Lincolnſhire*. In ſome counties they give verbal notice, in ſome none at all. The court thought ſome notice ſhould be given [*Salk.* 599], the ſufficiency of which, if diſputed, muſt be determined by the court upon the circumſtances. And that this notice was ſufficient, therefore diſcharged the rule. *Wright* v. *Page*. Tr. 12 *Geo.* 3. *C. B.* 2 *Blackſ. Rep.* 837.

If the principal defendant dies after the return of the *ca. ſa.* although his death be before the ſuing forth the firſt *ſcire facias*, the bail are fixed with the debt and coſts, in point of law; and the *ſcire facias's* are only an indulgence of the court. 2 *Wilſ.* 67.

On a recognizance taken in *B. R.* the *ſcire facias* muſt be brought in *Middleſex*. 3 *Danv. Abr.* 313. for the recognizances in *B. R.* are not obligatory by the caption, but by their being entered of record in the court. *Salk.* 600. 659. *Hob.* 195. *Brownl.* 69. *S. C. Moor* 883. *S. C. Styles* 9.

But if bail be taken by a *commiſſioner* in the country, the *ſcire facias* may either be ſued out into *Middleſex*, where the recognizance is entered of record, or the county where taken. *Lutw.* 1287.

But in *C. B.* if a recognizance be taken in *London* at a judge's chambers, and entered on record as taken in *London*, all the prothonotaries held, that the *ſcire facias* ought to be directed to the ſheriffs of *London*, and not to the ſheriffs of *Middleſex*. *Bro. Abr. fol.* 66, *b. pl.* 85. Although the recognizance is not a perfect

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a perfect record till it is entered upon the roll, yet when it is entered in *C. B.* it is held, that it is a record from the firſt acknowledgment, and binds perſons and lands from that time; for it is the acknowledgment before a judge that gives it the force of a record, though the inrolment be neceſſary for the teſtification and perpetuity of it. *Hob.* 195.

But in *Andrews* and *Harborne*, the prothonotaries certified, that upon ſuch recognizance, the *ſcire facias* might be brought in *Middleſex*, or in *London*. *Roll. Abr.* 891. *All.* 12.

And in *Kenny* v. *Thornton*, *C. B. Tr.* 11 *Geo.* 3. it was held that a *ſcire facias* on recognizance of bail in *London* may be there ſued, though the bail be inrolled in *Middleſex*. 2 *Blackſ. Rep.* 768.

And ſo, in *B. R.* where bail is taken by commiſſioners, the *ſcire facias* is ſued out, either into the county where taken, or into *Middleſex*, where filed. *Att. Prac.* 361.

In *C. B.* plaintiff recovered judgment in an action laid in the county of *Surry*. The bail had been taken before a judge. After judgment, and *ca. ſa.* returned againſt the principal: *ſci. fa.* againſt the bail were brought in *Surry*, and after two *nihils*, execution went, and the goods of the bail were taken by *fi. fa.* On motion and rule to ſhew cauſe why the award of execution, and *fi. fa.* ſhould not be ſet aſide with coſts, it being objected that the *ſci. fa.* ought to have been in *Middleſex*, and not elſewhere; the caption appearing by the record of the recognizance to be before the chief juſtice, and his brethren in court, as the entry always is of a bail on *cepi corpus* taken before a judge at chambers. The court held the objection good, and made the rule abſolute without coſts.

Where the caption of the recognizance appears to be in another county, and is afterwards inrolled in *Middleſex* (as in ſome other caſes), the *ſci. fa.* may be in either county; but where the caption appears by the record to be in *Middleſex*, the *ſci. fa.* muſt be in *Middleſex* alſo; and not elſewhere. A *ſci. fa.* to revive a judgment is the continuance of the ſuit, and muſt be brought in that county where the original action is laid. A *ſci. fa.* againſt bail is the firſt proceeding.

Several of the *filazers* reported the practice to be as the court held it. And that the *filazer* by whom the bail-piece is filed, and who enters the record of the recognizance on the roll, makes out the firſt *ſci fa.* into *Middleſex*, or other proper county, as the caſe requires: the ſecond *ſci. fa.* (when neceſſary) is ſigned by the prothonotary. *Vide Barnes*, 96.

But

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But on a recognizance of *bail in error*, if it be entered to be taken at a judge's chambers in *London*, the *ſcire facias* muſt be ſued there.

A *ſcire facias* againſt bail, is not amendable. *Grey* v. *Jefferſon*. *Stra.* 1165.

But a *ſcire facias* may be quaſhed, on motion, without coſts, before plea pleaded, though defendant has entered an appearance. *Barnes*, 431.

If the judgment of an inferior court is removed into *B. R.* or *C. B.* by *certiorari*, and the party ſues a *ſcire facias* to have execution, he ought to ſhew in his *ſcire facias*, that it is the judgment of ſuch an inferior court, removed thither by *certiorari*; and ought to ſhew the particular limits of the inferior juriſdiction, and pray execution within the particular limits. But if the judgment be removed into *B. R.* or *C. B.* by *writ of error*, or *falſe judgment*, and affirmed, the party may have execution in any part of *England*; for by the affirmance it is become the judgment of the ſuperior court. But then in a *ſcire facias* upon ſuch a judgment affirmed, the plaintiff ought to alledge, that it was removed thither by *writ of error*, &c.—— Vide *Guilliam* v. *Hardy*. 1 Ld. *Raym.* 216. 3 *Salk.* 320.

Another reaſon for abating the *ſcire facias* in the above caſe was, becauſe it recited the judgment of the inferior court, *ſicut per inſpectionem recordi nobis conſtat*, inſtead of ſaying *prout patet per recordium*. For if defendant were to plead *nul tiel record*, it ought to be tried by the record itſelf, and not *per inſpectionem recordi*.

Of the SCIRE FACIAS againſt Bail, and herein of the TESTE and RETURN of the Writ, &c.

IN *B. R.* if the ſuit was *by bill*, the *ca. ſa.* taken out againſt the principal in order to ground proceedings by *ſcire facias* againſt the bail, muſt have *eight* days between the *teſte and return*; and muſt lie *four* days, excluſive, in the ſheriff's office. *Salk.* 599.

So in *C. B.* and where a *ca. ſa.* againſt the principal, in order to found a proceeding againſt the bail, was left with the ſheriff the 6*th* of *Feb.* returnable the 9*th*; the court held it to be a day too ſoon, and on motion ſtayed the proceedings againſt the bail. *Barnes*, 64.

The *ca. ſa.* againſt the principal being left in the ſheriff's office, gives notice to the bail, that the plaintiff will proceed againſt the perſon, and therefore it is incumbent on the bail to ſearch whether any *ca. ſa.* be left in the office. *Burr. Rep.* 4 *pt.* 1360.

A *ca. ſa.* returnable pending error, is no regular foundation for proceeding againſt the bail. *Barnes*, 83.

If *by original*, it muſt have *fifteen days* between the *teſte* and *return.*

The *ſcire facias* againſt the bail muſt not bear *teſte* the ſame day as the *ca. ſa.* againſt the *principal.*

Two *ſcire facias's* were quaſhed, the *ca. ſa.* and the firſt *ſcire facias* bearing teſte on one and the ſame day. *Barnes*, 95.

But the *ſcire facias* againſt the bail may bear *teſte* the very day of the *return* of the *ca. ſa.* againſt the principal. *Stra.* 866. *Ld. Raym.* 1567.

But a *ſcire facias* muſt not bear teſte on a *Sunday*, for it is not *dies juridicus. Dy.* 168. *a.*

If the ſuit be by *original* in *B. R.* there muſt be *fifteen days* between the *teſte* and *return* of each writ. And the *teſte* and *return* may be both incluſive. And in this, whether the days ſhall be excluſive or incluſive, there is no difference between proceedings by *bill* or *original. Stra.* 765.

But if the ſuit be *by bill in B. R.* it is ſufficient if there are *fifteen days* between the *teſte* of the firſt *ſcire facias* and return of the ſecond; as if the firſt be teſted on 24*th October*, and the ſecond returnable on the 7*th November*, this is good.

The *ſcire facias* muſt be returnable as the original proceedings are, that is, at a day certain *or* a common return. *Ld. Raym.* 1417.

In *C. B.* if the ſuit was on a writ of attachment or a bill againſt a privileged perſon, fifteen days between the *teſte* and *return*

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return of a *ſcire facias* are not requiſite; but if by *original aliter*, and muſt be returnable on a general return.

In *C. B.* in a *ſcire facias* againſt bail, if there be fifteen days between the *teſte* of the firſt and *return* of the ſecond *ſcire facias*, that is ſufficient. *Pract. Reg.* 377. *Rules and Orders*, 2 *vol.* 114. *Pract. Utr. Banci*, 27.

And in *Peale* v. *Watſon & al. C. B. Mich.* 14 *Geo.* 3. it was held, that there muſt be fifteen days between the *teſte* of the firſt *ſcire facias*, and the *return* of the ſecond. 2 *Blackſ. Rep.* 922.

When the ſuit in *B. R.* is *by bill*, and the two *ſcire facias's* are made returnable in *fifteen days*, as they may—each writ ſhall have ſeven days between the *teſte* and *return*, and not one ten and the other *five*. *Pract. U. B.* 27.

But in *Elliott and Smith*, *Stra.* 1139. it was held, that if there be *fifteen days* between the *teſte* of the firſt, and the *return* of the ſecond *ſcire facias* againſt bail, it is ſufficient, without any regard to the number of the days between the *teſte* and *return* of each writ.

There were but *fourteen days* between the *teſte* and *return* of a *ſcire facias*; and the court held it aided by the 17 *Car.* 2. *c.* 8. *Lutw.* 26.

In *B. R.* when the ſuit is by *original*, the *filazer* makes out the *ſcire facias*.

In *C. B.* the *filazer* makes out the firſt *ſcire facias*, and the *prothonotary* the ſecond. *Barnes*, 96.

An *alias ſcire facias* muſt not iſſue till the firſt be returnable; and if it do, it is void. *Att. Pract.* 348.

And the *alias* muſt bear *teſte* the day of the return of the firſt in all caſes, except in caſe of a *ſcire facias quare executionem non* on a writ of error, and then it is not neceſſary. *Att. Pract.* 348.

If the plaintiff does not wiſh the bail to be ſummoned on the firſt *ſcire facias*, but would have a *nihil* thereto returned, it ought to be delivered to the ſheriff, or left in his office, *ſome time* before the return thereof. *Reg.* 5 *Geo.* 2.

In *Miller and Yarraway*, *Burr. Rep.* 4 *pt.* 1723, it was ſaid, that a *ſcire facias* againſt bail muſt lie in the ſheriff's office *four days* at leaſt before the return.

Every *alias ſcire facias* muſt lie *four days*, excluſive, before the return thereof in the office. *Reg. E.* 5 *G.* 2. *B. R.*

So every *ſcire facias*, on which a *ſcire feci* is returned, ought to be delivered to the ſheriff, or left in his office, *four days*, excluſive, before the return. *Ibid.*

But,

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But, if the party is ſummoned the day before, or on the day of the return, that is ſufficient.

The ſheriff muſt indorſe the time of his receiving it.

A *ſcire facias* againſt bail is not amendable; but the court, on motion, will quaſh it, if irregular. *Stra.* 401. 1165.

A *ſcire facias* ordered to be quaſhed, on plaintiff's motion, without coſts, before plea pleaded, although the defendant had entered an appearance. *Barnes*, 431.

The *alias ſcire facias* differs in nothing from the firſt, except in the *teſte* and *return*; and adding, after the words, "We command you," theſe words, "as we have before commanded you."

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WHEN a *non eſt inventus* is returned to the *ca. ſa.* taken out againſt the principal, the bail are then ſaid to be fixed with the debt and damages recovered, becauſe of the default made by the party; but notwithſtanding they are ſaid to be fixed, the court will relieve them, if they come in upon the *ſcire facias* againſt them, and ſurrender the *principal* in time.

Bail have *ex gratiâ curiæ*, till the return of the ſecond *ſcire facias* to ſurrender the *principal*.

Bail may be relieved by motion, where they cannot plead the matter to the *ſcire facias* againſt them. As where a *non eſt inventus* is returned to a *ca. ſa.* the condition of their recognizance being then broken, they cannot plead a render of the principal afterwards; nor would the courts formerly have accepted ſuch render; but they may now, upon render of the body, upon the return of the ſecond *ſcire facias*, move the court to ſtay the proceedings againſt them.

This indulgence of the courts aroſe from the great miſchief which happened to bail, by a plaintiff's taking out a *ca. ſa.* and making it returnable the next day,—ſo that bail had not time to bring in the body; wherefore the courts indulged the bail ſo far, as to permit them to render the body upon the return of the firſt *ſci. fa.* if the *ca. ſa.* was returnable *de die in diem*. *Cro. Car.* 618.

But if the *ca. ſa.* was returnable at the next ſummons, the bail was held ſtrictly to render the principal upon the return of the *ca. ſa.* and not after. *Ibid.* 738.

But afterwards the favour was extended, to admit a render any time before the return of the ſecond *ſcire facias*, or upon the return *ſedente curia*; but afterwards this practice was diſallowed. *Moor*, 850. 3 *Bulſt.* 182.

However, it has ſince become the practice again both in *B. R.* and *C. B.* as appears by 1 *Wilſ.* 270. in *B. R.* Where the court held, that the *bail* muſt render the principal the *quarto die* of the return of the ſecond *ſci. fa. ſedente curia* [and it is not ſufficient before a judge at chambers], or they come too late afterwards, even though the ſame day—and ſo is the practice in *C. B.* as appears by Ld. *Raym.* 156, 7. ſo that they always admit a render upon the return of the ſecond *ſci. fa.* [*i. e.* the *quarto die poſt* of the return day] *ſedente curia*, or any time before that. But all the admittances of theſe renders are *ex*

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gratia curiæ, and not *ex debito juſtitiæ*, for the condition of the recognizance is broken by the non-render upon the return of the *ca. ſa.* and therefore theſe renders cannot be pleaded, but the party muſt be relieved by motion.

If *ſcire feci* is returned to the firſt *ſcire facias*, the bail may ſurrender the principal on the appearance day of the return of that *ſcire facias*; that is, if the proceedings are by *original*; but if they are by *bill*, the ſurrender muſt be on the return day.

Per Cur. of *C. B.* Bail may ſurrender the principal before or on the appearance day of the return of the action on the recognizance, where plaintiff proceeds that way. If the proceedings againſt them be by *ſci. fa.* the render may be before or on the appearance day of the return of the firſt *ſci. fa.* ſitting the court, if that be returned *ſcire feci*; or it may be before or on the appearance day of the return of the ſecond *ſci. fa.* ſitting the court, in caſe of two *nihils* returned. *Deriſly* v. *Deland. Barnes*, 82.

If there be no *ca. ſa.* ſued out, returned, and filed, it is no ground for a motion to quaſh the *ſcire facias* againſt the bail; but the bail muſt plead it, and be diſcharged by that means.

A *ca. ſa.* may be void as to the principal, and yet well enough to ground a *ſcire facias* againſt the bail; as if a *ca. ſa.* be ſued out above a year after judgment, without reviving the judgment by *ſcire facias*; for the bail are ſtrangers, and cannot take advantage of that error in a collateral action. 2 *Ld. Raym.* 1096. 6 *Mod.* 304. *Holt*, 90.

A motion was made to ſtay proceedings againſt one of the bail, who had been excepted to, and had not juſtified, but had omitted to get his name ſtruck out of the bail-piece.—The court denied the motion in its preſent form, as in the caſe of *Fulk* and *Birk*, 4 *Geo.* 3. ſaying, that whilſt the name remained upon record, proceedings could not regularly be ſtayed; but, as in that caſe, they now gave leave to enter an *exoneretur* on the bail-piece, *nunc pro tunc*, on payment of coſts. *Humphrey* v. *Leite*, *Burr.* 4 *pt.* 2107.

The bail are not liable if the principal dies any time before the return of the *ca. ſa.* and they may plead it to the *ſci. fa.*

But the death of the principal, after the *ſcire facias* brought, does not diſcharge them, if he was alive at the *capias* returned. *Cro. Car.* 165. 1 *Rol. Abr.* 336, &c.

A motion

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A motion was made to ſtay proceedings againſt bail, becauſe the principal died after a *capias ad ſatisfaciendum* returned, but before the return of the ſecond *ſci. fa.* againſt the bail; but denied, becauſe it was the bail's omiſſion, that they did not ſurrender him, he living till after the return of the *ca. ſa.* 1 *Mod.* 31. 2 *Ld. Raym.* 1452. 2 *Stra.* 717.

Motion to ſtay proceedings in an action of debt on recognizance of bail, the principal having died after the return of the *ca. ſa.* and before the *capias ad reſpondendum* ſued out againſt the bail; but the rule was diſcharged. The recognizance is abſolutely forfeited immediately after a *ca. ſa.* returned; and if the principal dies afterwards, before a render, the bail are fixed in point of law. *Barnes*, 106.

Motion to ſtay proceedings againſt the bail, the *ca. ſa.* was returnable the laſt return of *Michaelmas*, viz. 28*th Nov.* and the principal died 1 *Dec.* the *ca. ſa.* being then in the ſheriff's office, and not actually returned till the 3*d Dec.* and the motion was denied. *Boyland* v. *Crooke and others, bail of Porter, B. R.* 1748.

But where the principal died after a *ca. ſa.* returned, and before it was filed, the court, on motion, ſtayed the filing it in favour of the bail. 1 *Lill. Abr.* 183. *Mich.* 35 *Car.* 2. *B. R.*

A *ca. ſa.* made returnable at a day which falls out of term, would not be void (though liable to be ſet aſide on motion)—nor can ſuch a defect in it be taken advantage of by bail, upon a general demurrer to a *ſcire facias* brought againſt them. *Burr. Rep.* 4*pt.* 1187.

An action was commenced againſt the bail, and afterwards the plaintiff was obliged to deſiſt therein; and then the bail ſurrendered the principal before the new action brought, and moved to ſtay the proceedings; the court held the ſurrender to be good, it being before the return of the proceſs in this ſuit, and it was the fault of the plaintiff not to begin right at firſt. *Hoare* v. *Mingay, one, &c. Stra.* 915.

In an action of aſſault and battery, the plaintiffs procured a judge's order to hold the defendant to bail for 140*l.* whereupon the defendant became bound in 280*l.* and the bail jointly and ſeverally in 140*l.* The plaintiffs had a verdict for 300*l.* and brought ſeparate actions on the recognizance againſt the bail. On which the bail moved the court, that on payment of one ſum of 140*l.* and coſts, proceedings might be ſtayed, and

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compared this to an action on bond. But the plaintiffs inſiſted, that there was a difference; for in a bond the condition is to pay the money; and if one obligor pays it, then the other is diſcharged, as the condition is complied with; but, in a recognizance, the condition is not ſatisfied till the damages recovered be paid, or the defendant ſurrendered. And it was held, that the bail being jointly and ſeverally bound, the actions againſt them could not be diſcharged, unleſs the condition of the recognizance was performed, *viz.* That the defendant paid what was recovered, or ſurrendered himſelf to the *Fleet*. *Calverac* and *Ux.* v. *Pinhero*. *Mich.* 12 *G.* 2. *C. P. Barnes*, 74. *Pract. Reg. C. P.* 88.

If an action be brought on a recognizance of bail, the writ muſt be ſerved *four days* before the return, and the bail may ſurrender the principal on the *quarto die poſt* of the return, *ſedente curia*; but not after the court is riſen. *Rep. & Caſ. of Pract. C. P.* 18.

Motion to ſet aſide a *fi. fa.* againſt bail, defendant having ſurrendered in their diſcharge. It appeared by affidavit, that the ſecond *ſci. fa.* was returnable *Cras Mart. Nov.* 12, and the defendant's ſurrender not before the 15*th*, the appearance day of the return. *Per Cur.* The affidavit is defective, as it does not ſhew that the defendant ſurrendered [*ſedente curiâ*] on the appearance-day of the return of the ſecond *ſci. fa.* which if he did not, the ſurrender is out of time. No rule. *Barnes*, 75.

The bail, for one who was convicted afterwards for a felony, brought up the body by *habeas corpus*; and the court allowed them to ſurrender him in diſcharge of themſelves. *Stra.* 1217.

Debt was brought on the recognizance: plea, no *ca. ſa.* repl. a *ca. ſa.* and demurrer, *inde*. But the court afterwards, being informed by motion that the defendants had ſurrendered the principal before the return of the *latitat* againſt them, ordered the proceedings to be ſtayed, and an *exoneretur* to be entered on the bail-piece, notwithſtanding the plea, replication, and demurrer, before the motion. *Dodſon* v. *King*, *Carth.* 516.

H. had a judgment obtained againſt him, and he rendered himſelf before the return of the *capias*, but never gave the plaintiff notice of his render, nor got the *bail-piece* diſcharged. The plaintiff proceeded to judgment againſt the bail on a *ſcire facias*,

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facias, and the court would not relieve them on motion, becauſe no *exoneretur* was entered, and a *ſcire facias* returned, but put them to their *audita querela*. *Salk.* 101.

The allowance of a bankrupt's certificate has no relation back, to diſcharge his bail, if they are fixed before ſuch allowance. 2 *Blackſ. Rep.* 811.

A creditor who obtains a verdict before commiſſion againſt a bankrupt, is entitled to prove his *coſts* as well as his *debt*, under the commiſſion, though judgment was not ſigned till after the commiſſion iſſued.—But by proving his debt, and otherwiſe acting under the commiſſion, he makes his election, and ſhall not afterwards reſort to the bankrupt's bail. *Aylett* v. *Harford and Richards, bail of Lowe. Tr.* 19 *Geo.* 3. *C. B.* 2 *Blackſ. Rep.* 1317.

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A Writ of *error* is ſo abſolutely a *ſuperſedeas*, that the plaintiff cannot ſo much as take out a *ca. ſa.* and return *non eſt inventus*, in order to proceed againſt the bail. *Sweetapple* v. *Goodfellow*. *Stra.* 867.

The plaintiff, in order to proceed againſt the bail, took out a *ca. ſa.* on the 3d of *December*. On the 4th a writ of error was allowed, notwithſtanding which he called for a return of *non eſt inventus*, and then waiting till the writ of error was at an end, proceeded by *ſcire facias* againſt the bail: and on motion, all the proceedings were ſet aſide: for the ground of them, *viz.* the return of *non eſt invent.* was obtained after notice of the writ of error, which in its nature ſtopt all proceedings, and the ſheriff could not ſo much as look after the defendant *. *Stra.* 1186. 1 *Wilſ.* 16.

Allowance of a writ of error, on a judgment by *nil dicit*, is ſo entirely a *ſuperſedeas* to a ſubſequent writ of execution, and all proceedings grounded thereon againſt the bail, that all may be ſet aſide upon motion. *Dudley* v. *Stokes*, *Hil.* 18 *Geo.* 3. *C. B.* 2 *Blackſ. Rep.* 1133.

But in *Ld. Raym.* 342. it is held, that *error* on the principal judgment is no bar to hinder the ſuing a *ca. ſa.* in order to charge the bail—and ſo again. *Ibid.* 1260. *Sed q.* as the other caſes above are more modern.

A *ca. ſa.* iſſued againſt the principal, and was lodged with the ſheriff for a *non eſt invent.* in order to proceed againſt the bail. After *ca. ſa.* lodged, defendant brought a writ of error; and after the writ was ſpent, plaintiff got a return of the *ca ſa.* and proceeded againſt the bail, which proceeding was diſcharged; the court holding, that the *ca. ſa.* being returnable at a time when the writ of error was depending, was not a regular foundation for a proceeding againſt the bail. *Barnes*, 83.

The plaintiff recovered judgment, took out a *ca. ſa.* and had a *non eſt invent.* returned. Of the judgment *error* was brought,

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* But *note*, there is a difference in the two courts of *B. R.* and *C. B.*

In *B. R.* a writ of error is a *ſuperſedeas* from the time of the allowance, and that is notice of itſelf—or if the party have notice thereof before the allowance, it is even from that notice a *ſuperſedeas*. *Bur. Rep.* 4 *pt.* 340. *Say*, 51.

But in *C. B.* a writ of error is no *ſuperſedeas* from the ſealing, but from the delivery to the clerk of the errors. *Barnes*, 205. 209.

and

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and two days after the plaintiff ſued out a *ſci. fa.* againſt the bail, who moved to ſtay the proceedings therein [as is done in caſes where, pending error, the plaintiff brings debt on the judgment], inſiſting that it was more reaſonable in this caſe, becauſe otherwiſe the bail might loſe the advantage of diſcharging themſelves by ſurrendering the principal, which they can do at any time before the return of the ſecond *ſci. fa.*; and the court thought it reaſonable that the proceedings ſhould be ſtayed, on the bail's conſenting, that if the judgment be affirmed, they would ſurrender the principal, or give judgment on the *ſci. fa.* *Myer* v. *Arthur*. *Stra.* 419.

But on a like motion as above, it appearing that bail was not put in upon the writ of error, ſo as to make an abſolute *ſuperſedeas*, the court refuſed to ſtay the proceedings on the *ſci. fa.* ſaying, they would not go one ſtep farther than the caſe of *Myer* v. *Arthur*. *Hunter* v. *Sampſon*. *Stra.* 781.

So where the *ſecond ſci. fa.* was returned, and a four-day rule given, on the fourth day of which error being brought on the principal judgment, the bail moved to ſtay proceedings on the *ſci. fa.* and cited *Myer* v. *Arthur*. But, *per Cur.* that differed, for there the bail came in time whilſt they might ſurrender, which they cannot do here after the return of the *ſecond ſci. fa.* at which time no writ of error was brought. Rule denied. *Everett* v. *Gery*. *Stra.* 443.

And, *per Cur.* in *Richardſon* v. *Jelly*. *Stra.* 1270. Where the bail do not apply to ſtay the proceedings pending error, till their time to ſurrender is out, we will not give them any time for that purpoſe, but only four days to pay the money in, after the judgment is affirmed.

The bail in the original action upon a writ of error brought, are not liable to the coſts upon the affirmance of the judgment.

Though an action of debt on a judgment may be brought, pending a writ of error in the original action, and the court will let the plaintiff proceed to judgment thereon, and only ſtay execution till the writ of error is determined, yet if an action of debt on the recognizance of bail in the original cauſe be brought pending *error* on the judgment, the court will ſtay proceedings in ſuch action, without the bail giving judgment; for, by the judgment, the bail would be barred from ſurrendering the principal. *Prac. Reg. C. P.* 83. *Barnes*, 66. 68.

The *ſecond ſcire facias* was returnable the firſt day of the term; and a week within term the bail moved to ſtay the proceedings, on the common terms of giving judgment in the *ſcire*

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facias, and taking four days to ſurrender after the affirmance of the principal judgment. But the court ſaid they came too late, after the time to ſurrender was gone, and would not revive it again: all they would do was, to ſtay the ſuing out execution againſt them, till after the affirmance in error. *Cole* v. *Buckland*. *Stra*. 872.

The plaintiff got judgment on the *ſcire facias* againſt bail, pending *error* by the principal, and took them in execution; and now they moved to be diſcharged. *Sed per Cur*. Though you might have applied, and had the proceedings ſtayed, yet we will not ſet them aſide. If an action of debt had been brought upon the judgment, we ſhould have granted an imparlance, if it had been aſked; but we never ſet aſide the judgment when it is once ſigned; becauſe we take it, that by your not applying in time you have ſubmitted to meet the plaintiff. *Fiſher* v. *Emerton*. *Stra*. 526.

After a judgment on *ſci. fa.* againſt bail, he moved to ſtay execution, the principal having brought error, and the bail undertaking to pay condemnation money, and the coſts on the *ſci. fa.* in four days after affirmance. But in this caſe, there being no bail on the writ of error, the court made the bail undertake alſo to pay the coſts on the writ of error, in caſe the judgment was affirmed; and ſaid it was a favour they were aſking, and they would make them ſubmit to equitable terms. *Ritſon* v. *Francis*, *bail of Naſh*. *Stra*. 877.

Error was brought in *cam. ſcacc.* upon a judgment obtained againſt the defendant in *B. R.* and writs of *ſcire facias* had iſſued againſt the bail in the original action in *B. R.* where the bail obtained a rule to ſtay proceedings againſt them in *B. R.* upon the *ſcire facias's*, until the writ of error returnable in *cam. ſcacc.* ſhould be determined, they undertaking to pay the debt and damages within four days after *affirmance* of the judgment, if the ſame ſhould be *affirmed*. The judgment was *affirmed* in *cam. ſcacc.* and afterwards the original defendant brought error returnable in parliament to reverſe the judgment given in *cam. ſcacc.* on which the bail moved to ſtay proceedings againſt them till that writ of error was determined; and though it was objected, that the bail were bound by the *expreſs terms* in the former rule, the court made the rule abſolute, holding, that the word "*affirmance*," in the firſt rule, muſt neceſſarily be underſtood to mean *final affirmance*. *Kirſhaw* v. *Cartwright and Pearce*, *bail of Green*. *Burr*. 4 *pt*. 2819.

Of

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IF the plaintiff proceeds by *ſcire facias*, the uſual way is to ſue out a *ſcire facias*, and get it returned *nihil*; and then ſue out an *alias ſcire facias*, and upon a *nihil* alſo returned to that, after a rule given, ſign judgment on the *ſcire facias*. But if the plaintiff would have the parties ſummoned, either upon the firſt or ſecond *ſci. fa.* the ſheriff will make him out a ſummons, which he muſt give to an officer, with inſtructions for the execution thereof; and, at the return of the writ, the ſheriff will return *ſcire feci*; for, in all caſes of *ſcire facias* againſt *bail*, there muſt be a *ſcire feci* returned, or *two nihils*; for two *nihils* amount to a warning.

Where two writs of *ſcire facias* iſſue returnable in different terms, the firſt muſt be entered of the term wherein it is returnable; and an award of the ſecond is ſufficient, without ſetting it forth at length.

The writs and returns in *B. R.* if *by bill*, muſt be filed at the *Treaſury Chamber*, or at the *King's Bench* office, with Mr. *Heberden*, the ſigner of the writs.—But if by *original*, with the *uſtos brevium*.

In *C. B.* they are entered on the *prothonotary's* remembrance roll.

Where a *ſcire facias* againſt bail is not returned, the plaintiff cannot proceed upon an *alias ſci. fa.* without an entry of the firſt upon the roll. *Ld. Raym.* 822. 1252.

After the writs and returns thereto are filed, the plaintiff muſt take out a rule to appear, and ſerve a copy thereof on the bail, thus:

A. B.
v.
E. F. and *G. H.* bail of *C. D.* } Rule on *ſcire facias*, 8*th April*, 1780.

The above rule expires in four days excluſive, but *Sunday* is not one; and, if the parties do not enter an appearance, at the expiration thereof judgment may be ſigned on the *ſcire facias*.

But if they enter an appearance in time, the plaintiff muſt declare in *ſcire facias*, and the proceedings to iſſue or demurrer are the ſame as in other caſes.

The appearance is by ſending a note to the attorney for the plaintiff, ſignifying that the bail appears to the *ſcire facias*.

Of

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THE form of a declaration in *ſcire facias* is as follows:

Eaſter Term, 20 *Geo.* 3.

[Prothonotary's name if in *C. B.*] [Chief clerk's name if in *B. R.*]

Middleſex, to wit. Our lord the king gave in charge to the ſheriff of *Middleſex* his writ, cloſe in theſe words, to wit, *George* the Third, *&c.* [here inſert the proceedings, from the ſuing out the *ſcire facias*, exactly as they have been—whether if only one *ſcire facias*, and a *ſcire feci* returned thereto; or if a *ſcire facias* and *nihil* returned, and then award of an *alias ſcire facias*, and *ſcire feci* returned thereto, inſerting the writs and returns.] And the ſaid *E. F.* and *G. H.* at that day having been ſolemnly demanded, came by *Q. R.* their attorney, upon which the ſaid *A. B.* prays execution to be adjudged to him of the debt and damages (or of the damages, coſts and charges, as the action was) aforeſaid, according to the force, form, and effect of their ſaid recognizance, *&c.*

O. P. for the plaintiff.
Q. R. for the defendant.

A declaration on a *ſcire facias*, returnable the laſt return of the term, may be entitled of the ſame term generally. 3 *Wilſ.* 154.

A man may plead in abatement, or in bar to a *ſcire facias*, as well as other actions. *Lucas*, 112.

There are but few pleas in bar which can be pleaded by bail to a *ſcire facias*.

They can plead that no *ca. ſa.* iſſued againſt the principal, or that he died before the return of the *ca. ſa.* or that the plaintiff had other execution.

But they cannot plead, that the principal died before the *ſcire facias* iſſued. *Cro. Jac.* 163, *&c.*

But they can plead, that the principal died before any judgment againſt him; becauſe they cannot have a writ of error to reverſe that judgment.

If the principal ſurrendered himſelf, or the bail rendered him [upon or before the return of the *ca. ſa.* or otherwiſe, ſuch render

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render cannot be pleaded, though upon ſuch render afterwards the court will diſcharge them on motion. *Vide ante.*] But ſuch ſurrender, or render, are not ſufficient, unleſs the plaintiff or his attorney have notice thereof; and this is required, that the plaintiff may, if he pleaſes, charge him in execution, alſo that he may not be at any further trouble or charge againſt the bail. *Leon.* 58. 2 *Bulſt.* 260. *Moor* 883.

Alſo now by 4 & 5 *Ann. c.* 16. *ſ.* 12. *payment* of the ſum recovered may be pleaded as well to a *ſci. fa.* as to an action of debt.

For other pleas, *vide* the *books.*

Bail pleaded to a *ſcire facias*, payment by the principal before the return of the *ſecond ſcire facias*; and it was reſolved the plea was bad; for, in ſtrictneſs of law, the recognizance was forfeited by ſuing out the firſt *ſci. fa.* againſt the bail. *Ld. Raym.* 157. But *vide* the 4 & 5 *Ann. c.* 16. *ſ.* 12.

Sci. fa. againſt the defendant as bail for *A. B. C.* and *D.* the defendant pleads, that before the return of the ſecond *ſci. fa.* the plaintiff took *A.* in execution, and ſtill detains him—Demurrer *inde.* It was argued for the defendant, that the plaintiff having taken one of the principals in execution, had thereby diſabled the bail to render him, and therefore diſcharged him as to all the reſt. *Sed per Cur.* The bail have undertaken to bring in all four principals; and therefore though the plaintiff hath taken one, this does not diſcharge the bail as to the other three, for they ought, as they took upon them, to bring in all four. 2 *Lev.* 192. 1 *Vent.* 315.

Formerly, if the plaintiff recovered a greater ſum than was laid in the action, the bail were not liable. 1 *Salk.* 102. But now, where the plaintiff declares for, or recovers a greater ſum than is expreſſed in the proceſs on which he declares, the bail ſhall not be diſcharged, but be liable for ſo much as is ſworn to and indorſed on the ſaid proceſs; or for any leſs ſum which the plaintiff in ſuch action ſhall recover. *Paſch.* 5 *Geo.* 2.

The practice of the courts, upon pleading to *ſcire facias*, is exactly the ſame as in other caſes; only in the *venire*, *diſtringas*, or *habeas corpora* and *jurata*, for a trial upon the *ſcire facias*, after the words, "in a plea of debt, treſpaſs, *&c.*" (as the action may be), add theſe words, "Whereupon a *ſcire fa-*"*cias*, &c."

Scire facias againſt *Fane* and *Barker*, bail of *Barrell*, judgment thereon, and a *ca. ſa.* againſt *Fane* only taken out. *Per Cur.*

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Cur. Though the *ſcire facias* was joint, yet the execution may be ſeveral.

If there is a judgment in *C. B.* againſt bail, upon a *ſcire facias*, no *capias* lies on ſuch judgment—otherwiſe if the judgment was given againſt them in *debt*, for then it is within the ſtatute, 25 *Edw.* 3. *c.* 17. But if there is a judgment in *B. R.* againſt bail, upon a *ſcire facias*, a *capias* lies. For ſo has been the cuſtom of that court. 3 *Salk.* 286.

And in *Elliott* v. *Smith*, *B. R. Stra.* 1139. it was held, that a *ca. ſa.* may be taken out againſt bail, without any *fi. fa.* or return of *nulla bona* previouſly iſſued.

On a judgment on *ſcire facias* againſt bail, a writ of error was brought in the *Exchequer Chamber*, purſuant to the ſtatute 3 *Ja.* and adjudged, that in this caſe, no *capias* lies againſt them; for this matter is not to be guided by the cuſtom of the *King's Bench*, but by the common law; and the bail bound their *goods* and *lands* by the recognizance, and not their *perſons*. 3 *Salk.* 287. 1 *Roll.* 898.

And if *bail* bring *error* upon an award of execution in a *ſcire facias* againſt them, matter which lies properly in the mouth of the principal, or might have been pleaded to the *ſcire facias*, is not aſſignable for error, after execution awarded againſt them. *Wraight* v. *Kitchingham*. *Stra.* 197. *Salk.* 262. 4 *Mod.* 306.

A judgment on a *ſcire facias* againſt bail was reverſed for want of a *warrant* of attorney. *Salk.* 603.

Caſe was, a *writ of error* was brought upon the award of execution on a *ſci. fa.* againſt bail; and thereupon the record of the judgment againſt the principal was alſo returned. It was aſſigned for error, that the *ſci. fa.* was ſued out and proſecuted by J. S. his attorney, but no warrant of attorney entered of record. It was anſwered that J. S. appears to have been the attorney in the principal cauſe, and in that to have had a warrant. But the court reverſed the judgment; for the record againſt the principal need not have been certified upon this writ of error; and the ſuit againſt the principal was another diſtinct ſuit. Therefore there ought to be a particular warrant of attorney for the *ſci. fa.* againſt the bail, and this warrant ought to be entered, not before the writ (for any one may ſue out the *ſcire facias*), but upon the return thereof, for then the ſuit commences. *Atwood* v. *Burr*.

A moiety

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A moiety of the damages was levied on one bail; and the other bail not having goods ſufficient to levy the remainder, the plaintiff took out a ſecond execution againſt the goods of the firſt *bail.* But, on motion to ſet aſide the ſecond execution, the court held it irregular, for the plaintiff might have levied the whole at firſt. *Barnes*, 202.

If the plaintiff, in a *ſcire facias*, either for want of the damages being previouſly aſcertained, or upon obtaining judgment by default upon the *ſcire facias*, or judgment upon demurrer therein, is of neceſſity obliged to ſue out a *ſcire fieri inquiry*, in order to aſcertain his damages, he muſt give the like notice of executing the ſame, as muſt be given in other caſes of trial, and executing writs of inquiry. For which, *vide* the firſt *vol.* under thoſe titles.

Note; A *ſcire facias* againſt *bail* is not amendable.

Rule made abſolute to ſet aſide the final judgment againſt the principal, and all the ſubſequent proceedings againſt him and his bail. *Three* objections were made in points of irregularity; *1ſt*, To the judgment, that it was not ſigned till about two months after the death of R. the original plaintiff. *2d*, To the revival of the judgment by W. the adminiſtrator, which was by one *ſci. fa* only returned *nihil* (no new perſon being called in on defendant's part). *3d*, To the award of execution not docqueted till after defendant had appeared to the *ſci. fa.* As to the *ſecond* and *third*, the court did not think it neceſſary to give any opinion, but as to the firſt they held it to be good. The law abominates circuity and expence; though the judgment be erroneous in point of fact, yet it may alſo be deemed irregular; where the application to ſet it aſide is recent, the bail ought not to be put to an *audita querela.* The judgment is a nullity. Plaintiff, at the time when it was given, could not come to demand it, and his warrant of attorney was extinct. *Whitehead Admr. of Reevely* v. *Gale, bail of Stewart*, *Barnes*, 277.

In a *ſcire facias* againſt bail, the plaintiff made a miſtake in ſetting out the recognizance, which the defendant took advantage of, by pleading *nul tiel record.* And afterwards, the plaintiff moved to amend it, but was denied: for *ſcire facias's* againſt bail are never amended; and the courſe is, for the plaintiff to quaſh his own writ. This may be to defeat the bail of an opportunity to ſurrender, which he would have done, if he could not have been ſure of proceeding in his plea. *Grey* v. *Jefferſon.* *Stra.* 1165.

But

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But in the *Common Pleas*, a *ſcire facias* againſt bail, and all proceedings thereupon, were ordered to be amended by the record in the original action, by inſerting the word *merchant* inſtead of *mercer*, being the defendant's addition, even after iſſue joined upon *nul tiel record*. *Smeetland* v. *Beazley and Browne*. *Barnes*, 4.

Judgment in *Middleſex* againſt the principal. *Sci. fa.* againſt the bail in *Middleſex*, an award of execution, and thereon a *fi. fa.* in *Middleſex*, and nothing levied. After the year and day, plaintiff ſued two *ſci. fa's*, to revive the award of execution into *London*, and after *nihils*, ſued thereon a *fi. fa.* in *London* and levied there. And on motion, the rule was made abſolute to ſet aſide the *fi. fa.* and for reſtitution. *Per Cur.* The *ſci. fa*, to revive a judgment or award of execution, muſt be in that county where judgment is recovered or execution awarded. The *ſci. fa.* againſt bail may be in *Middleſex* (the record of the recognizance being at *Weſtminſter*), or in the county where the caption of the recognizance appears to be on record, if in any other county than *Middleſex*. *Pickering* and *Ux.* v. *Thompſon, bail of Miller*. *Barnes*, 267.

Scire facias upon a judgment obtained againſt D. to have execution againſt the bail, who pleaded *executio non*, becauſe *before the iſſuing the firſt writ of ſci. fa. and before the iſſuing any writ of ca. ſa. againſt the principal, he died.* To which plaintiff replied, *that the principal* is living at, &c. *and traverſed, that he died before the iſſuing forth of the writ of ca. ſa.* Demurrer *inde* and *joinder*, and objected that plaintiff had traverſed the death of the principal before the iſſuing of the ſaid writ of *ca. ſa.* when there was no ſuch writ ſet forth by defendants in their plea, but only a general allegation, *viz.* Before the iſſuing of any *ca. ſa.* which is uncertain; therefore the plaintiff in his replication, ought to have ſet forth the time when the *ca. ſa.* iſſued, and that the ſheriff returned *non eſt inventus*; like debt on a bond for performance of covenants in an indenture, defendant cannot plead performance generally, without ſetting forth the indenture. The replication was adjudged ill, and the court being ready to give judgment, the plaintiff prayed leave to diſcontinue, which was granted. *Carth.* 4.

Of

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THE ſecond ſort of *ſcire facias*, which is proper to be treated of in this place, is that to revive a judgment formerly had between the parties; and on which no execution was taken out after the rendering ſuch judgment. And this *ſcire facias* to revive a judgment, being a continuance of the ſuit, muſt be brought in that county where the original action was laid. Vide *Barnes*, 97.

Different opinions have been entertained, whether a *ſcire facias* in ſuch caſe lay at Common Law? But the doubt, ſays lord *Coke*, aroſe for want of diſtinguiſhing between *perſonal* and *real* actions. 2 *Inſtit.* 469.

At Common Law, if after judgment given, or recognizance acknowledged, the plaintiff ſued out no execution within the year; the plaintiff, or his conuzee, was driven to an original on the judgment; and the *ſcire facias*, in *perſonal* actions, was given by *Weſt.* 2. *c.* 45. 2 *Salk.* 600. *pl.* 8. *Ld. Raym.* 669. *Co. Lit.* 290. *b.* *Sid.* 351. 3 *Co.* 12. 3 *Mod.* 189. 4 *Mod.* 248.

But in *real* actions, or upon a *fine*, though no execution was ſued out within a year after the judgment given, or fine levied, yet after the year, a *ſci. fa.* lay for the land, *&c.* becauſe no new original lay upon the judgment or fine. 2 *Inſtit.* 470. And the reaſon why it lay in this caſe was, for that in a real action one could have no other advantage of his judgment; but in a perſonal action he might have debt on his judgment.

A *ſcire facias* lay alſo in *mixed* actions as well as *real*, as in an aſſize, writ of annuity, and ejectment.

Therefore, after judgment had in a *perſonal* action, and no execution ſued out within a year, the plaintiff muſt revive the judgment by *ſcire facias*, and have judgment thereon, before he can ſue out execution.

But if execution were ſued out within the year, and returned, and from which the plaintiff had no benefit, there needs no *ſcire facias* in ſuch caſe afterwards, but that execution may be continued down on the roll to any diſtance of time. And where execution was awarded on a *ſcire facias*, and *four years* after the defendant, being in the *Fleet* for another cauſe, was brought into court by *habeas corpus*, and there admitting himſelf to be the ſame perſon, he was committed in execution without a *ſcire facias*.

So if there be a *caſſet executio* for a year, or a *writ of error*, no *ſcire facias* is neceſſary.

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But it ſeems, the *ceſſet executio* ſhould be entered on record.

However, if the plaintiff does not take out execution within a year after the *ceſſet executio* is determined, he muſt firſt ſue out a *ſcire facias*.

If execution is ſtayed by *injunction* out of *Chancery* for above a year, the plaintiff muſt ſue out a *ſcire facias*. *Prac. Reg. C. P.* 370. *Same in B. R.* 1 *Stra.* 301. *Salk.* 322.

And a *ſuperſedeas quia improvide* was awarded to an execution [ſtayed by an injunction out of *Chancery* for above a year] ſued out without a previous *ſci. fa.*

But an *injunction* only ſtays the actual executing the writ; therefore, a plaintiff may ſue out his execution, notwithſtanding an injunction, and continue it down by *vicecomes non miſit breve*. Ibid.

But notwithſtanding the rule is, that *if no execution be ſued out within a year, a ſcire facias muſt be ſued out to revive the judgment*, yet the court of *B. R.* in the caſe of *Mitchell* v. *Cut* and *Ux. Burr.* 4 *pt.* 660. were unanimous, that this rule of reviving a judgment above a year old, by *ſcire facias*, before ſuing out execution upon it, which was intended to prevent a ſurprize upon the defendant, ought not to be taken advantage of by a defendant, who was ſo far from being ſurprized by the plaintiff's delay, that he himſelf had been trying all manner of methods whereby he might delay the plaintiff, *viz.* by *injunction*, *&c.* And ſo the court not only diſcharged the rule [which had been obtained to ſet aſide the execution], but with coſts.

An execution had after a year and day, without a *ſcire facias*, is not void, but voidable only. 3 *Lev.* 404. *Salk.* 273. *pl.* 4.

If a defendant brings *error*, and is nonſuit therein: or if the writ be diſcontinued, although it be above a year ſince the original judgment was given, the plaintiff may take out execution; for though in ſuch caſes there is not any new judgment given, yet the bringing of the writ of error revives the firſt judgment. *Cro. Jac.* 364. *Rol. Rep.* 104. 133.

If the plaintiff delay the executing a writ of enquiry, till a year after the interlocutory judgment, he cannot do it after without a *ſcire facias*. *Caſ. in B. R. Paſch.* 13 *W.* 3. *How.* v. *Cuton.*

But in the caſe of the king, there need not be any *ſcire facias* after the year and day. 2 *Salk.* 603. *pl.* 13. Ld. *Raym.* 328. 553.

After

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After a judgment, if the plaintiff within the year ſues a *ſcire facias*, he cannot after have a *capias* within the year, till he hath a judgment on the *ſci. fa.* *Rol. Abr.* 900.

If the plaintiff does not proceed upon the firſt *ſcire facias*, within a year and a day, he cannot afterwards proceed on that writ, but muſt ſue out a new *ſcire facias*, for the old writ is diſcontinued.

If a judgment be above ten years ſtanding, the plaintiff cannot ſue out a *ſcire facias*, without motion in court. 2 *Salk.* 598. *pl.* 3.

If under ten, but above ſeven years, not without a motion at the ſide bar.

But if, after ſuch motion the judgment is revived by a *ſcire facias*, and then the defendant dies before execution, the plaintiff muſt ſue out a new *ſcire facias*; and may have it without motion, for the judgment was revived before. 2 *Salk.* 598.

On a judgment of above twenty years old, the court of *C. P.* (according to a precedent ſaid to have been ſettled about nine years before) gave leave to the *adminiſtrator cum teſtamento annexo* of the plaintiff, to ſue out a *ſcire facias* to revive the ſame. But that no execution ſhould be taken out thereon, until either the ſheriff makes an actual return of *ſcire feci*, or an affidavit be made and filed of perſonal notice being ſerved on defendant of the iſſuing ſuch *ſcire facias*. *Coyſgarne & Fly, Eaſt.* 15 *Geo.* 3. 2. *Blackſ. Rep.* 995.

If the judgment of an inferior court is removed into *B. R.* by *certiorari*, and the party ſues a *ſci. fa.* to have execution upon ſuch judgment, he ought to ſhew in his *ſci. fa.* that it is the judgment of ſuch an inferior court removed thither by *certiorari*, and ought to ſhew the particular limits of the inferior juriſdiction, and pray execution within the particular limits. But if the judgment be removed into *B. R.* by writ of error, and affirmed, the party may have execution in any part of *England*; for by the affirmance it has become the judgment of the *King's Bench*. But in a *ſci. fa.* upon ſuch judgment affirmed, the plaintiff ought to allege, that it was removed thither by writ of error. *Ld. Raym.* 216.

After judgment recovered, *Hil.* 30, 31 *Car.* 2. and no execution actually ſued out within the year and day, the plaintiff, without a previous *ſci. fa.* in *Trin. vac.* 5 *W. & M.* took out an *elegit*, on which an inquiſition was had, and defendant's lands delivered in execution; and then the plaintiff entered on the *roll* an award of an *elegit*, of the ſame term with the judg-

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ment, with continuances of *vicecomes non miſit breve* to the time of ſuing out the *elegit*. And on examination, it appearing to have been the practice for many years, the court, conſidering the inconveniences that might enſue by opening a gap to deſtroy many executions, and becauſe the practice had prevailed ſo long, ordered the execution to ſtand. *Carth.* 283. 2 *Show.* 235. 3 *Danv. Abr.* 33.

A *ſcire facias* lies not on a judgment pending a writ of error brought on that judgment, but the writ of error pending is a good plea to the *ſci. fa. Ld. Raym.* 1295.

If judgment is againſt two, the *ſcire facias* muſt be againſt both; for it is a judicial writ, and muſt purſue the nature of the judgment. 2 *Salk.* 598.

If a joint judgment is obtained againſt two, and one dies, the *ſcire facias* ought to be brought againſt both the ſurvivor and the repreſentatives of the deceaſed defendant. Vide *Carth.* 105.

But if there be a joint judgment againſt two, and one dies, a *ſcire facias* lies againſt the other alone, reciting the death; and he cannot plead that the heir of him that is dead has aſſets by deſcent, and demand judgment if he ought to be charged alone; for at common law, the charge upon a judgment being perſonal ſurvived; and the ſtat. of *Weſtm.* 2. that gives the *elegit*, does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his execution which way he pleaſes, for the words of the ſtat. are, *ſit in electione:* but, if he ſhould, after the allowance of this writ and the revival of the judgment, take out an *elegit* to charge the lands, the party may have remedy by ſuggeſtion, or elſe by *audita querela*. Vide *Bac. Abr.* 3 *vol.* 698, *&c.*

After interlocutory judgment the plaintiffs became bankrupts, then took out a writ of inquiry, and proceeded to final judgment in their own names. On which judgment, the plaintiff's aſſignees ſued a *ſcire facias* to ſhew cauſe why they ſhould not have execution: Defendant pleaded the whole matter of the bankruptcy in bar, and prayed judgment if the aſſignees ought to have execution againſt him. Demurrer *inde* and *joinder*. The court held the aſſignees properly entitled to the damages; and that the bankrupts proceeding in their own names, after the *interlocutory* judgment, till final judgment, was well enough, becauſe the *interlocutory* judgment entitled the bankrupts to ſomething, which by the inqueſt was aſcertained. *Hewit & al. aſſignees of Bibbins & al.* v. *Mantel.* 2 *Wilſ.* 372.—The aſſignees might have taken up the cauſe after the interlocutory judgment.

Plaintiff

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Plaintiff had a judgment, and brought a *ſcire facias*, to which the defendant pleaded, and judgment thereon was for the plaintiff, who afterwards became a bankrupt. The commiſſioners aſſigned the original judgment to *P.* who moved the court that it might be entered to entitle him to the benefit of the judgment on the *ſci. fa.* which was ruled accordingly, without bringing a new *ſci. fa. Plumer* v. *Lea.* 5 *Mod.* 88.

A man had judgment in debt, then became a bankrupt, and afterwards ſued out execution; and the money being levied and brought into court, the aſſignee moved that it might not be paid to the plaintiff [the bankrupt], ſurmiſing that the judgment was aſſigned to him. But the court detained the money till the aſſignee brought a *ſcire facias* to try the bankruptcy—cited in the above caſe in 2 *Wilſ.* 372.

A *ſcire facias*, if againſt the party, is *in hac parte*; but if againſt bail, *in ea parte*. *Salk.* 599. *Ld. Raym.* 393. 532.

A *ſcire facias* to revive a judgment or award of execution, muſt be in the county where the judgment is recovered, or execution awarded. *Hob.* 4. *Cro. Car.* 228.

And the *ſcire facias* muſt be returnable at a common return, or at a day certain, as the original proceedings were. *Ld. Raym.* 1417.

If the proceedings were by *original*, there muſt be fifteen days between the *teſte* and *return* of each *ſcire facias*; and the writs muſt be returnable on a general return.

But in *ſcire facias's* on writs of attachment, or bills againſt privileged perſons in *C. B.* fifteen days are not requiſite between the *teſte* and *return*.

And in *B. R.* if the proceedings were by *bill*, fifteen days incluſive between the teſte of the firſt and return of the ſecond *ſci. fa.* is ſufficient.—But then each writ ſhould have ſeven days before the *teſte* and *return*, and not one ten and other five.

Every *ſcire facias* whereon *nihil* is to be returned, ſhould be delivered to the ſheriff, or left in his office, ſome time before returned. *Reg. Eaſt.* 5 *Geo.* 2.

The *alias ſcire facias* muſt be delivered to the ſheriff, or left in his office, *four days* before returned. *Ibid.*

So every *ſcire facias*, on which a *ſcire feci* is to be returned, ought to be delivered to the ſheriff, or left in his office, *four days* excluſive, before the return day. *Ibid.*

The ſheriff muſt indorſe the time of his receiving it.

And if the party is ſummoned the day before, or on the return day, it is ſufficient. *Att. Prac. B. R.* 347. The ſame in *C. B.*

Of the SCIRE FACIAS to revive a Suit by and againſt the ſame Parties.

In a *ſcire facias* to revive a judgment, the term of the recovery need not be inſerted; and ſaying *nuper recuperavit* is good. For upon *nul tiel record* it may be made certain by the record. *Barnes*, 431.

In *B. R.* in all caſes, there muſt be two *nihils*, or one *ſcire feci* returned.

But in *C. B.* in order to revive a judgment, if both parties are alive, one *ſcire facias*, though returned *nihil*, is ſufficient.

After the writs and returns are filed, the plaintiff gives a rule to appear, which expires in four days; and if no appearance is entered, he may then ſign judgment on the *ſcire facias*, and take out his execution.

But if the party appears, the plaintiff declares in *ſcire facias*; and the practice throughout the ſubſequent proceedings is exactly the ſame as in other caſes. Of appearing, declaring, pleading, *&c.* in *ſcire facias*, vide ante, under title *ſci. fa.* againſt bail.

Where the party has a matter which he might have pleaded to the *ſcire facias* in his diſcharge, and *two nihils* are returned, and judgment againſt him, the court will relieve him upon motion, without putting him to an *audita querela*. *Aliter* in caſe a *ſcire feci* be returned. *Anon. Salk.* 93.

In a *ſcire facias* on a judgment, if defendant has a releaſe, and omits to plead it, he ſhall not have an *audita querela*. Vide 1 *Wilſ.* 98.

Where a *ſcire facias* is brought on a judgment in *B. R.* the plaintiff muſt ſhew where the court of *B. R.* was held, becauſe that court is ambulatory, *ubicunque fuerimus in Anglia:* but if it be brought on a judgment in *C. B.* 'tis otherwiſe, becauſe the court of *C. B.* is confined to a certain place. 3 *Salk.* 321.

Of

Of the SCIRE FACIAS to continue a Suit by and againſt the Repreſentatives of one of the Parties dying BEFORE final Judgment.

BY the 17 *Car.* 2. *c.* 8. it is enacted, "That in all actions perſonal, real, or mixt, the death of either party, between the verdict and the judgment, ſhall not hereafter be alleged for error, ſo as ſuch judgment be entered within two terms after ſuch verdict."

And "where any judgment after a *verdict* ſhall be had, by or in the name of any executor or adminiſtrator, in ſuch caſe an adminiſtrator *de bonis non* may ſue forth a *ſcire facias*, and take execution upon ſuch judgment."

A. ſued a *ſci. fa.* againſt *C.* as executor of *B.* on a judgment obtained by the plaintiff againſt the ſaid *B.*—*C.* pleaded in abatement, that *B.* died before judgment, *&c.* To this *C.* replied, and ſet out the *ſtat.* 17 *Car.* 2. *c.* 8. and that *B.* died after the verdict obtained againſt him, and after the day of *niſi prius*, and before the day in bank. Thereupon *C.* demurred. And the objection was, that the plaintiff ought to have ſued a *ſpecial ſcire facias*, and not a general one; for this ſuppoſes a judgment againſt the teſtator in his life-time; and the replication ſhews it was entered after his death, though well entered according to the ſtatute. *Sed per Cur.* The writ is good as it is, and could not be otherwiſe; for had it been *ſpecial*, there would have been a variance, the judgment being entered generally; and a *reſpondeas ouſter* was awarded. *Ld. Raym.* 1280.

The death of either party, before the aſſizes, is not remedied by this ſtatute; but if the party die after the aſſizes begin, though the trial be after his death, that is within the remedy of the ſtatute; for the aſſizes is but one day in law. Yet the court ſaid it was in their diſcretion, whether they would arreſt the judgment. But in *Ld. Raym.* 1415. it was holden not aſſignable for error, it appearing by the record, that the defendant appeared *per attornatum ſuum.*

By the 8 & 9 *W.* 3. *c.* 11. *ſ.* 6. it is enacted, "That in all actions commenced in any court of record, if any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained therein, the ſaid action ſhall not abate by reaſon thereof, if ſuch action might be originally proſecuted or maintained by the executors or adminiſtrators of ſuch plaintiff; and if the defendant die after ſuch interlocutory judgment, and before final judgment therein obtained, the ſaid action ſhall not

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abate, if ſuch action might be originally proſecuted or maintained againſt the executors or adminiſtrators of ſuch defendant: and the plaintiff, or if he be dead, after ſuch interlocutory judgment, his executors or adminiſtrators ſhall and may have a *ſcire facias* againſt the defendant, if living after ſuch interlocutory judgment; or if he died after, then againſt his executors or adminiſtrators, to ſhew cauſe why damages in ſuch action ſhould not be aſſeſſed and recovered by him or them; and if ſuch defendant, his executors or adminiſtrators, ſhall appear at the return of ſuch writ, and not ſhew or allege any matter ſufficient to arreſt the final judgment, or being returned warned, or upon two writs of *ſcire facias* it be returned, that the defendant, his executors or adminiſtrators, had nothing whereby to be ſummoned, or could not be found in the county, ſhall make default; that thereupon a writ of inquiry of damages ſhall be awarded, which being executed and returned, judgment final ſhall be given for the ſaid plaintiff, his executors or adminiſtrators, proſecuting ſuch writ or writs of *ſcire facias*, againſt ſuch defendant, his executors or adminiſtrators reſpectively."

This *ſcire facias* to continue a ſuit, muſt go into the county where the action is laid.

The former ſtat. 17 *Car.* 2. makes the judgment good, as entered between the parties themſelves to the ſuit, though one died after the *verdict*, and before the judgment entered.

But by this ſtat. of 8 & 9 *W.* 3. if a defendant dies after interlocutory judgment, and the action may be continued againſt his repreſentatives, the final judgment muſt be againſt the repreſentatives, for they are expreſly taken notice of for that purpoſe; and the *ſcire facias* againſt them muſt be ſpread and appear on the ſame record. *Vide* 1 *Salk.* 42.

If a defendant dies after a *writ of inquiry* executed, and before the return thereof, it is within this act; and the *ſcire facias* againſt his executor or adminiſtrator muſt be to ſhew cauſe, why the damages aſſeſſed ſhould not be recovered. *Goldſworthy* v. *Southcot*, *B. R.* 1 *Wilſ.* 243.

The plaintiff, as adminiſtrator to *J. S.* ſued a *ſcire facias* againſt the defendant, ſetting forth, that his inteſtate ſued the defendant as executor in ſuch an action, and had judgment by *nil dicit*; on which a writ of inquiry was awarded, which abated

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abated by the inteſtate's death before the return; that adminiſtration was granted the plaintiff, and commanded the ſheriff to ſummon the defendant to ſhew cauſe, why the plaintiff, as adminiſtrator, ſhould not have judgment: to which *ſci. fa.* the executor pleaded a bond of his teſtator's, on which judgment had been recovered, and no aſſets *ultra*. To which plea plaintiff demurred, and had judgment; for the ſtatute never intended that the executor ſhould ſtand in any other circumſtances, to make another defence than the party himſelf might have made againſt the inquiry; and he could have pleaded nothing but a releaſe, or other matter in bar ariſing *puis darrein continuance*. He is, by the words of the ſtatute, to ſhew cauſe why damages in ſuch caſe ſhall not be aſſeſſed and recovered; and if he ſhall appear at the return, and not ſhew any matter ſufficient to arreſt the final judgment, then a writ of inquiry ſhall be awarded, *&c.* And arreſting judgment is by matter apparent in the record, and not extrinſic; and heretofore they pleaded in arreſt of judgment, as now it is moved. And the executor cannot be hurt by this, for the judgment is only *de bonis teſtatoris*, as if recovered againſt the teſtator himſelf. *Salk.* 315.

The defendant died after the rule was out, but before the time given to plead by a judge's order expired; and the plaintiff ſigned an interlocutory judgment, and ſued out a *ſcire facias* againſt the defendant's executor upon this ſtatute, to ſhew cauſe why damages ſhould not be aſſeſſed and recovered; but on motion, the court ſet aſide the proceedings for irregularity, as the writ abated by the death of the defendant before interlocutory judgment was ſigned, notwithſtanding the rule to plead was out. And ſo held in *Sibert* v. *The executor of general Ruſſel*, *Mich.* 9 *Geo.* 2. *Wallop* v. *Irwin*, 1 *Wilſ* 315.

The plaintiff died after verdict, and before judgment entered; afterwards judgment was entered, and execution taken out by his repreſentative without a *ſci. fa.* And on motion to ſet aſide the *fi. fa.* it was held, that, although the judgment was regularly entered by 17 *Car.* 2. yet the *fi. fa.* iſſued irregularly, for there ought to have been a *ſci. fa.* So the execution was ſet aſide. *Earl* v. *Brown. B. R.* 1 *Wilſ.* 302.

Defendant died before an interlocutory judgment duly obtained was ſigned. His adminiſtrator brought a *ſci. fa.* and

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on ſhewing cauſe againſt ſetting the judgment and ſubſequent proceedings aſide, the court were of opinion, that the roll having been filed before the eſſoign day of *Hilary* (which was the term next after defendant's death), the judgment was good by relation, though the party was dead before the actual ſigning; eſpecially as it was only interlocutory, to which no day of ſigning is required to be ſet, and diſcharged the rule to ſhew cauſe, *Barnes*, 266, 267. Vide *Ld. Raym.* 766. *Salk.* 37.

The *teſte* and *return* of ſuch writs of *ſcire facias* are according to the action, whether that is by *bill* or *original*; and proceedings therein are the ſame as in other caſes of *ſcire facias*.

Of

Of the SCIRE FACIAS by and againſt the Repreſentative of a Party to the Suit, dying AFTER Judgment, and BEFORE Execution.

ONE that is no party to the record, recognizance, fine, or judgment, as the heir, executor, or adminiſtrator, though they be privy, and it be within the year, ſhall have no writ of execution, but a *ſcire facias* to enable themſelves to the ſuit; and ſo of the tenant or defendant; for the alteration of the perſon altereth the proceſs: otherwiſe in the caſe of a ſtatute ſtaple or merchant, becauſe the proceſs is given by other acts of parliament. 2 *Inſt.* 471. *Cart.* 112. 193. *Godb.* 83.

But if there be two plaintiffs in a perſonal action, and one of them dies pending the ſuit, that ſhall not put the other to a *ſcire facias*; ſo if one of the defendants die, becauſe the ſame party ſtill remains on record. 7 *Mod.* 68. But the way is now, to ſuggeſt the death of the party upon the roll, on record, at whatever ſtage of the ſuit he died, according to 8 & 9 *W.* 3. *c.* 11. *ſ.* 7.

So if there is judgment againſt *A.* on which a *fi. fa.* is ſued out; but before execution thereof *A.* dies inteſtate, there needs no *ſcire facias* to renew this judgment; but execution of the goods under that writ of *fi. fa.* may be made in the hands of the adminiſtrator. *Farrer* v. *Brooks.* For, as the party himſelf could not have made any defence to the writ of execution, there is no reaſon that his repreſentative ſhould be in a better condition.

But if there be judgment in debt againſt two, and one dies, a *ſcire facias* lies againſt the other alone, reciting the death; and he cannot plead, that the heir of him deceaſed has aſſets by deſcent, and demand judgment if he ought to be charged alone; for at common law, the charge upon a judgment, being perſonal, ſurvived; and the ſtat. *Weſt.* 2. which gives an *elegit*, does not take away the common law remedy, and therefore the plaintiff may take out his execution which way he pleaſes; but if he ſhould, after allowance of this writ and revival of judgment, take out an *elegit* to charge the land, the party may have remedy by ſuggeſtion, or by an *audita querela*. Vide *Bac. Abr.* 4 *vol.* 419.

If an executor brings a *ſcire facias* on a judgment, or a recognizance, and gets a judgment *quod habeat executionem*, and dies inteſtate, the adminiſtrator *de bonis non* muſt bring a *ſcire facias* upon the original judgment, and cannot proceed upon the judgment in the *ſcire facias*. Vide *Ld. Raym.* 1049.

A *ſcire facias* by executors upon a judgment obtained by the teſtator—demurrer *inde*, and it was inſiſted, that the practice of

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of this court in ſuch caſes is, that the plaintiffs in the *ſcire facias* ſhould inſert the profert of letters teſtamentary [this clauſe being omitted], and that the writ is not good. To which it was anſwered, that it was inſerted at the end, and that is the practice of *B. R.*—*Per Cur.* Both forms are good here; but in *C. B.* this clauſe is always inſerted in the end. Judgment *pro quer.* *Carth.* 69.

A *ſcire facias* againſt an adminiſtrator, teſted 24*th October*, and returnable the 31*ſt October*, *alias ſcire facias* teſted 31*ſt October*, returnable 7*th November*; and it was objected, that theſe writs were irregular, becauſe there were not fifteen days between the 24th of *October* and the 7th of *November*; but adjudged well, there being eight days excluſive between the *teſte* and *return* of each writ. *Carth.* 468.

In *B. R.* in all caſes there muſt be either two *nihils* returned to the *ſcire facias's*, or a *ſcire feci*; but in *C. B.* in caſe of the death of the *plaintiff* one *nihil* is ſufficient. *Att. Pract. C. B.* 337.

But in caſe of the death of the *defendant*, there muſt be a *ſcire feci*, or two *nihils* returned. *Ibid.*

If a *feme*, executrix to *J. S.* marries, and then ſuch huſband and wife bring debt againſt *A. B.* on an obligation in the right of the wife as executrix, and have judgment to recover the debt, damages and coſts, and then the wife dies before execution ſued, the huſband cannot have a *ſcire facias* upon the judgment; for that he, though he was privy to the judgment, ſhall not have the thing recovered; but it belongs to the ſucceeding executor or adminiſtrator. *Cro. Car.* 207. 227. *Beaumont* v. *Long*, adjudged, although it was objected, that the judgment was for the *coſts and damages* which belonged to the huſband, though the debt did not; and therefore the *ſcire facias* ſhould be for the damages; but the *ſcire facias* being as well for the debt as damages, it was held not maintainable; and whether he might maintain a *ſci. fa.* for the damages and coſts, they would give no opinion. *Jones*, 248. *S. C.* adjudged, and ſaid this recovery does not turn it to the proper debt of the huſband, as it would if the baron and feme recovered the proper debt of the feme.

But if huſband and wife obtain judgment, and the wife dies, the huſband, without taking out adminiſtration to her, may have a *ſcire facias*; for by the judgment it is become a debt to him. *Sid.* 337. *Cro. El.* 844. 3 *Mod.* 188. 2 *Leon.* 14. 4 *Leon.* 186.

So

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So if a woman obtains judgment in debt, and after marries, and the huſband and wife ſue out a *ſcire facias*, and thereupon have an award of execution, though the wife dies, yet the huſband [without taking out adminiſtration] may have execution upon the judgment, for the award upon the *ſci. fa.* attached in the huſband, and ſhall ſurvive, though objected, the award on the *ſci. fa.* made no alteration, as the execution muſt be on the firſt judgment. *Woodyer* v. *Greſham*, *Salk.* 116. *pl.* 7. and *Comb.* 455, *S C.* by which it appears, that the year expired before the *ſci. fa.* taken out; and ſaid by *Holt*, ch. juſt. That the debt was attached to him, jointly with his wife; ſo that although the award of the execution did not alter the nature of the debt, yet it altered the property. *Carth.* 415. *Skin.* 682. *pl.* 2.

If a judgment in debt is obtained againſt a *feme ſole*, who afterwards marries, and then a *ſcire facias* is thereupon brought againſt huſband and wife; and after two *nihils* returned, judgment is given, that the plaintiff ſhall have judgment againſt them, and then the wife dies, the huſband ſhall be liable to this execution. *Carth.* 30. *Salk.* 116. *pl.* 7.

In the above caſe of *Obrian* and *Rom*, reported alſo in 1 *Mod.* 170. If judgment be againſt a *feme ſole*, and ſhe marries; and then plaintiff ſues out a *ſcire facias* againſt huſband and wife, and has judgment *quod habeat executionem*, againſt both, and afterwards the wife dies, plaintiff may ſue out a *ſcire facias* againſt the huſband, and have judgment thereon againſt him.

And ſo *vice verſa* in *Woodyer* v. *Greſham*, *Salk.* 116. If *feme ſole* recovers judgment, and then takes huſband, and they both ſue out a *ſcire facias*, and have judgment *quod habeant executionem*, and then ſhe dies, the huſband alone may have a *ſcire facias* afterwards, and have execution.

A *ſcire facias* was brought againſt defendant as adminiſtratrix of her huſband, on a judgment againſt him for 1,500 *l.* and after two *nihils* returned, a *ſcire fieri inquiry* was taken out, and the defendant attended the execution of it, in order to lay the ſtate of the aſſets before the jury; but the plaintiff inſiſting, that the award of execution on the former writs, was in point of law an evidence of aſſets, a *devaſtavit* was found to 1,117 *l.* *&c.* In *Hil.* 8 *Geo.* 2. ſhe appeared to the *ſcire fieri inquiry*, pleaded *plene adminiſtravit*, and traverſed the *devaſtavit*; and notice of trial being given and countermanded, and nothing further done on it, ſhe, in *Mich.* 10 *Geo.* 2. moved to have the award

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award of execution ſet aſide, and to be admitted to plead; it being to no purpoſe to expect relief upon the trial of the traverſe; and cited *Salk.* 93. 264. to ſhew, that where there has been no *ſcire feci*, and only two *nihils*, the court will relieve upon motion, and not put the party to an *audita querela*: and the ſtate of the real aſſets was proved to be 130*l.* which ſhe offered to deliver up, and be examined upon interrogatories, if the plaintiff was diſſatisfied with the account. The court was greatly inclined to relieve her; but upon conſideration of her long acquieſcence, and the ſeveral ſteps taken ſubſequent to the award of execution, they thought ſhe came too late, and for that reaſon only refuſed to interpoſe. *Wharton* v. *Richardſon we. Stra.* 1075.

Formerly the method was, upon obtaining judgment by default againſt an *executor* or *adminiſtrator* (which would reach only the goods of the teſtator or inteſtate), and *nulla bona* returned to a *fi. fa.* ſued out on ſuch judgment, to iſſue out a writ to inquire, whether the defendant had waſted any of the effects of the deceaſed; and if a *devaſtavit* was found by the inquiſition, and returned thereto, then for the plaintiff to proceed by *ſcire facias* for the defendant to ſhew cauſe why the plaintiff ſhould not have judgment *de bonis propriis*; to which *ſcire facias* the executor or adminiſtrator could appear and plead *plene adminiſtravit* [as in the caſe above].—But now the *fieri facias inquiry*, and the *ſcire facias*, are incorporated, and made out in one writ for expedition. However, this method, though much better than the old one, is ſeldom purſued at this day, as it does not anſwer to the plaintiff if the debt is but a ſmall one, becauſe no coſts are allowed againſt the executor or adminiſtrator, unleſs they appear and plead to the *ſcire facias*, and it be found againſt them. But the way is to bring an action of debt on the judgment, ſuggeſting a *devaſtavit*.

A. recovered judgment in B. R. by *nil dicit* againſt B. B. brought error thereon in *cam. ſcacc*, which was ſtill depending. Afterwards A. became bankrupt, and the judgment was aſſigned by the commiſſioners to the aſſignees, who ſued out as aſſignees two *ſcire facias's* in B. R. on the judgment, and on two *nihils*, had judgment, and took the defendant's goods in execution on a *fi. fa.* On which B. moved, that the judgment on the *ſci. fa.* might be ſet aſide as irregular, and have reſtitution, the writ of error being ſtill depending. On reference to the maſter, he reported as above, with this addition, that A. died after the writ

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writ of error brought, and after *in nullo eſt erratum* pleaded.—And the court held, *firſt*, that the writ of error was not abated by the death of the defendant in error, after *in nullo eſt erratum* pleaded; *ſecondly*, that a *ſcire facias* don't lie on a judgment pending error brought thereon; but that error pending is a good plea to ſuch *ſcire facias*. So that the *ſcire facias* was not regular. But then the judges made a queſtion, whether they ſhould ſet the judgment on the *ſcire facias* aſide on motion, and the execution ſued thereon, or ſhould drive the defendant to an *audita querela*? but on conſideration they all held the whole proceedings irregular, and ſet them aſide on motion. *Aſſignees of Kiffin* v. *Lennard. Ld. Raym.* 1295.

Plaintiff's teſtator obtained judgment, which after his death was revived by two *ſcire facias's*, with *nihils* returned; and defendant being taken in execution, moved to be diſcharged, upon producing a releaſe from the teſtator. On ſhewing cauſe, it appeared doubtful whether the releaſe was executed by the teſtator; and thereupon it was inſiſted, that though when the *ſcire facias* is not ſerved, the court will in a clear caſe relieve the party upon motion, and not put him to his *audita querela*; yet they will never do it where the fact is diſputed. And ſo the court agreed; but then they would have had the plaintiff's conſent to try it in a feigned iſſue, the defendant lying actually in execution; which the plaintiff, who was an executor in truſt, refuſing to conſent to, the court refuſed to do any thing upon motion, and left the defendant to his *audita querela*. *Mitford Exor.* v. *Lordwell. Stra.* 1198.

Of

Of Proceedings by and againſt ATTORNIES.

ATTORNIES have privilege not to be ſued in any other courts except thoſe in which they are ſworn and admitted, becauſe of the prejudice that may accrue to the buſineſs of thoſe courts in which their attendance is required; neither are they to be held to *ſpecial bail*, becauſe they are obliged to attend, and therefore are preſumed to be always amenable: alſo, as officers of the court, they are entitled to the proceſs of *attachment*, and may ſue by *attachment of privilege*.

But this *privilege* an attorney ſhall not have at the *king*'s ſuit. 2 *Rol. Abr.* 274. *Bro. Superſedeas* 1. 9 *Hen.* 6. 44.

Nor unleſs there be the ſame remedy in his own court; therefore he ſhall not have his *privilege* when money is attached in his hands by foreign attachment in the ſheriff's courts in *London*. *Saund.* 67. *Vide Comb.* 427.

Nor in an *action real* againſt an attorney of the *King's Bench*. *Saund.* 67.

Nor in *appeal* againſt an attorney of the *Common Pleas*. *Saund.* 67.

Nor when he ſues, or is ſued in *auter droit*, as executor or adminiſtrator. 12 *Mod.* 316. *Ld. Raym.* 533. *Hob.* 117. *Salk.* 2. *pl.* 4.

But if an attorney, *executor* or *adminiſtrator* is ſued by *bill of privilege*, he cannot object after appearance, for the fault is cured by appearance. *Barnes*, 167. *Sed. q.* if ſhewn for cauſe of *demurrer*.

Nor where an attorney of one court ſues another of another court, the defendant ſhall not plead his *privilege*; for the attendance of the plaintiff is as neceſſary in his court, as the defendant's is in his; and therefore, the cauſe is legally attached in the court where the plaintiff is an officer. *Rol. Abr.* 275. *Moor*, 556. 2 *Mod.* 298. 2 *Lev.* 129.

But *quære*, as to this, for it ſeems, the defendant attorney muſt be ſued *by bill*, although the plaintiff is an attorney; and therefore he muſt be ſued in his own court. *Stra.* 1141. *Barnes*, 43, 44.

Nor when he joins, or is joined, in the ſame action with others. *Vent.* 298. *Dyer*, 277. *Godb.* 10.

One attorney ſued another attorney of the ſame court by attachment of privilege, and on motion the proceedings were ſtayed. *Barnes*, 44.

An action on a penal ſtatute, *viz.* 13 *El.* for entering a fraudulent judgment againſt an attorney of *C. B.* was commenced by *original*; on which he moved to ſtay proceedings, inſiſting he ought to be ſued *by bill*. On ſhewing cauſe, it was urged,

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urged, that this was a proſecution for the crown: and that defendant, if entitled to privilege, may plead it. *Sed per Cur.* Theſe *qui tam* actions are never conſidered as the king's cauſes. In proſecutions at the ſuit of the crown, defendants, though acquitted, can have no coſts; but in actions *qui tam* it is otherwiſe. The proceeding by original is irregular. Rule abſolute to ſtay proceedings. *Britton* qui tam *v. Teaſdale. Barnes*, 48.

An attorney has *privilege* to keep the *venue* in *Middleſex* when he is *plaintiff*, but not to change it thither when he is *defendant*. *Burr. Rep.* 4 *pt.* 2027. 2032. But *contra* in 2 *Vent.* 47. and *vide* 1 *Salk.* 668. If an attorney, being *plaintiff*, lay his action in *Middleſex*, the *venue* ſhall not be changed; otherwiſe if in *London*.

An attorney has no *privilege* againſt the court of conſcience in *London*. *Burr. Rep.* 4 *pt.* 1583.

An attorney may have his *privilege* in ſuing a *member* of the univerſity. *Ld. Raym.* 342.

If an attorney abſent himſelf for a year together, and does not give his attendance, he loſes his *privilege*. *Sed vide Lutw.* 1667. where it is ſaid, that he ſhall have his *privilege*, ſo long as he continues an attorney *on record*, though he does not practiſe.

But by *Burr. Rep.* 4 *pt.* 2113. 2116. in *B. R. Privilege* continues no longer than he remains an *acting attorney*.

Anciently rolls were kept of attornies in *B. R.* but ſince the *ſtamp acts* the rolls have been diſuſed, and a book ſtamped hath been kept, and the attornies names entered therein. *Stra.* 77. But in *C. B.* there is a regular record kept of the attornies: *Ibid.*

The *privilege* of an attorney is the *privilege* of the court he belongs to, and not his own *perſonal privilege*; and he may wave it. *Burr.* 4 *pt.* 2113. that is, when he is *plaintiff*.

But an attorney cannot wave his *privilege* of being ſued by *bill*. And one having cauſe of action againſt him, however ſmall, may ſue him in the *ſuperior court*, inſtead of ſuing him in an *inferior*. *Gardner* v. *Jeſſop, one, &c. in C. B.* 2 *Wilſ.* 42.

Defendant, an attorney of *C. B.* was ſued in *B. R.* by *bill of privilege*; plaintiff, ſuppoſing him an attorney of that court, judgment went by default, and plaintiff ſtaid two terms in hopes of receiving his debt, and then gave notice of executing a writ of enquiry, whereupon defendant moved to ſet aſide the proceedings as irregular. But the court, on ſhewing cauſe, diſcharged the

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the rule, and held, that by laying by ſo long, he had waived his privilege. *Hern.* v. *Howard.* 3 *Blackſ. Rep.* 231.

An attorney muſt be ſued *by bill*, though the plaintiff be alſo an attorney; and he cannot take out an attachment and hold the defendant *to bail*, as he does in the caſe of common perſons; therefore this caſe is an exception out of the rule, that *priviledge* takes away *privilege*. *Ratcliffe one, &c.* v. *Beſley.* *Stra.* 1141.

Attornies muſt ſue each other by *bill*, as well when they are of different courts as of the ſame. *Barnes*, 43, 44.

If the plaintiff is attorney of *B. R.* and defendant is ſo likewiſe, privilege will be allowed. *Secus* if plaintiff belongs to *C. B.* and defendant to *B. R.* for defendant is not ſuppoſed to be preſent in *C. B.* as he is in *B. R.* *Shorter* v. *Parkhouſe.* *B. R. Eaſt.* 20 *Geo.* 2. 2 *Blackſ. Rep.* 18. And in *Dauſer* v. *Berryman* *C. B. Mich.* 20 *Geo.* 3. where an attorney of one court ſues an attorney of another, the privilege of that court which is poſſeſſed of the cauſe ſhall be preferred. 2 *Blackſ. Rep.* 1325.

But an attorney of *C. B.* may, for a debt *bona fide* paid, ſue an attorney of *B. R.* *by attachment*, and he ſhall not be entitled to *privilege*. *Barnes*, 44.

Pending a *forejudger*, obtained againſt defendant by another perſon, plaintiff ſued him by *bill*, as having privilege of an attorney. Defendant moved to ſet aſide the ſecond *forejudger*, inſiſting, that his privilege was ſuſpended by the firſt; and plaintiff ought to have ſued him by *original*, in the common way. On ſhewing cauſe, rule made abſolute without oppoſition. *Vincent* v. *Willoughby.* *Barnes*, 43.

One attorney of *C. B.* ſued another attorney of *C. B.* by *capias*; and the defendant moved to ſtay the proceedings, inſiſting he ought to be ſued by *bill*. It appeared that the defendant had obtained a judge's order for time to put in *bail*; but this was held not to be a ſufficient waiver of his objection to the plaintiff's method of proceeding againſt him, and the rule was made abſolute to ſtay proceedings with *coſts*. *Barnes*, 53.

An attorney having been arreſted, was *bailed*; and another action being brought againſt him in the ſame court, he pleaded his *privilege*; and it was adjudged, that putting in bail to the firſt action did not diſcharge his privilege. *Carth.* 377.

An attorney of *C. B.* was arreſted at the ſuit of an attorney of *B. R.* and gave *bail*; and then *B.* delivered a *declaration by the by* againſt him, as in cuſtody of the *marſhal*, to which he

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pleaded his *privilege*; and reſolved, that though he be in cuſtody of the *marſhal*, at the ſuit of *A.* yet when *A.* declares againſt him, he may plead his *privilege*, becauſe he comes here by coercion, and had no opportunity before to take advantage of it. 2. That although he files *bail* at the ſuit of *A.* and in the ſame term a declaration is delivered againſt him at the ſuit of *B.* yet the defendant may plead his privilege againſt *B.* as well as againſt *A.* for it were abſurd, that *B.* who tops his ſuit upon the action of *A.* ſhould have more liberty or advantage againſt the defendant than *A.* himſelf had. But if the defendant waives his privilege in the firſt action, he is then obnoxious to the ſuits of every body, notwithſtanding his privilege. 3. That if after the defendant has waived his privilege, he ſhall yet plead it, the plaintiff in his replication muſt ſhew the defendant's waiver, and rely upon the eſtoppel. *Ld. Raym.* 135. Vide *Wilſ. Rep. B. R.* 306. *Salk.* 1.

Declaration *by bill of Middleſex* againſt an *attorney* of *B. R.* as acceptor of a bill of *exchange* drawn upon him, according to the cuſtom of *merchants*; to which defendant pleaded in abatement, that he was, and ſtill is, an attorney of *B. R.* and ought to have been ſued there by *bill of privilege* as an attorney, and not by *bill of Middleſex*. Demurrer *inde* and *joinder*. *Per Cur.* He muſt have his privilege. Judgment for defendant. *Cornforth* v. *Price*. *Hilary*, 20 *Geo.* 3. *B. R.*

An attorney has *privilege* in a *qui tam* action commenced againſt him. *Barnes*, 48. *Att. Prac.* 54. *Skin.* 549.

If an attorney ſue by *original*, he has no privilege, and cannot ſue in *propria perſona*. 2 *Lev.* 39. 2 *Stra.* 837. *Barnes*, 479.

It has been ſaid, that a *bill* cannot be filed againſt an attorney in *vacation*. But it has been done in many caſes, to ſave the ſtatute of limitations. *Per Buller, juſtice, in Cornforth* v. *Price*. *B. R.*

A motion was made, that an *attorney*, who was going to *Ireland*, might put in *ſpecial bail*, and denied. 1 *Mod.* 10.

If an attorney is arreſted, it is a motion of courſe, to diſcharge on *common bail*; 1 *Wilſ.* 292. that is, an attorney of the ſame court. But if an attorney of *C. B.* is arreſted by proceſs of *B. R.* he muſt *plead his privilege*, and cannot be diſcharged on *common bail*. *Stra.* 864. 1 *Wilſ.* 306.

An attorney of *B. R.* arreſted by *capias* on a ſpecial original out of the ſame court, is not entitled to his diſcharge by ſerving the ſheriff with a writ of privilege, but muſt plead it *ſub pede ſigilli*.

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vigilli. Held by *C. P.* in an action by attorney for falſe impriſonment againſt the ſheriff. *Croſsley* v. *Shaw. Eaſt.* 16 *Geo.* 3. 2 *Blackſ. Rep.* 1085.

If an attorney of *C. B.* be *actually* in the *cuſtody of the marſhal*, he ſhall only be ſued in *B. R.* 1 *Stra.* 191. and cannot plead his *privilege*; 2 *Roll. Abr.* 232. for there is a great difference between an *actual* and a *ſuppoſed* cuſtody. 1 *Salk.* 1.

In an action againſt *baron and feme*, if the huſband be an attorney, he cannot appear in perſon, and put in bail for his wife, but he ought to put in *bail* for himſelf and his wife; for he ſhall not have privilege in an action againſt him and his wife. 1 *Roll.* 380. *c.* 45.

By 12 *Geo.* 2. *c.* 13. *ſ.* 9 it is enacted, "That no attorney or ſolicitor, who ſhall be a priſoner in any gaol or priſon, or within the limits, rules, or liberties of any gaol or priſon, ſhall, during his confinement in any gaol or priſon, or within the limits, rules, or liberties of any gaol or priſon, in his own name, or in the name of any other attorney or ſolicitor, ſue out any writ or proceſs, or commence or proſecute any action or ſuit, in any courts of law or equity, under pain of being ſtruck off the roll and incapacitated, *&c.*"

This ſtatute only diſqualifying attornies who are priſoners, relates only to proſecuting, and not to defending ſuits. *Barnes*, 263.

An attorney, priſoner, commencing an action on a bail-bond, aſſigned after his impriſonment, in an action begun before, is not within this ſtatute, it being a continuance of the former ſuit.

Attornies, in caſe of miſbehaviour or *mal* practice, are ſubject to the animadverſion and cenſure of the court in which they are admitted by a ſummary application, by way of motion thereto; and will be ſtruck off the rolls, impriſoned, or otherwiſe puniſhed, at the diſcretion of the court; and the proceſs ſued out, on ſuch occaſions, to bring them into court, is an *attachment*; and being iſſued at the ſuit of the king, for contempt of the court, muſt be made out by the clerks in the *Crown-office*.

An attorney cannot be *leſſee* in *ejectment*. *Mich.* 1654. Nor bail in any action depending in the court of which he is an attorney. *Ibid.* But an attorney houſe-keeper is often bail, though contrary to the above rule. 8 *Mod.* 338.

Attorney cannot be commiſſioner to take bail. *Stat.* 4 *W. & M. c.* 4.

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Attorney or not, muſt be tried by the record. And yet, when an attorney pleads his privilege, he has no occaſion to ſay, *prout patet per recordum*, or to produce his writ of privilege. And *per Holt* ch. juſt. There are two ways of pleading his privilege ſo as it cannot be denied, *viz.*—with a *profert* of a writ of privilege, or an exemplification of the record of his admiſſion of attorney. But he may plead his privilege only. *Vide Ld. Raym.* 1173.

If an attorney ſues in right of his wife, and joins her in the action, he cannot ſue by *writ of privilege*. *Ld. Raym.* 1398.

No advantage can be taken of an erroneous *writ of privilege* (on error brought) upon the bare recital in the record; but the writ itſelf ought to be before the court by *certiorari*. *Ld. Raym.* 1398.

Of Proceeding by an Attorney PLAINTIFF.

AN attorney *plaintiff* may ſue by *attachment of privilege*, which is in the nature of an *original* writ, and is to the following effect:

GEORGE the Third, *&c.* To the ſheriff of *Middleſex*, greeting. We command you, that you attach *C. D.* and *E. F.* [any number of defendants may be put in this writ], if they may be found in your bailiwick, and them ſafely keep, ſo that you may have their bodies *before us* at *Weſtminſter*, on * next after [a day certain in term, if in *B. R.* and not a general return day], to anſwer *A. B.* gentleman, being one of the attornies of our court, *before us*, according to the liberties and privileges of ſuch attornies and other miniſters of the ſame court, from time whereof the memory of man is not to the contrary uſed and approved in the ſame court of a plea of treſpaſs [or whatever the action is], and have there this writ.

Witneſs, *&c.*

If the attachment requires only a *common appearance*, a copy muſt be ſerved, with notice as in other caſes.—If the party is to be held to bail, the ſum ſworn to muſt be marked on the back of the *writ*, and alſo the day it is ſued out.

In *B. R.* an *attachment of privilege* is but as a *latitat*, and not as an *original*. 1 *Show.* 367.

But it has been ſaid, that an *attachment of privilege* in *C. B.* is not like an *original* writ, and therefore plaintiff may put ſeveral defendants into one *attachment*, and declare againſt them ſeverally. *King's Rep.* 38.

In another caſe held, that an *attachment of privilege in C. B.* is in the nature of an *original* writ; and when it is replied to ſave the *ſtatute of limitations*, it is ſufficient to ſhew the *teſte* without continuances, till the declaration. *Finch* v. *Wilſon, one, &c. of C. B. in error.* 1 *Wilſ.* 167.

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* In *C. B.* the *attachment* muſt have *fifteen days* between the *teſte* and *return*. *Barnes*, 410. And the *præcipe* for a *writ of attachment of privilege* in *C. B.* muſt be left with the *prothonotary*, according to the rule, *Hilary*, 11 *Geo.* 2. *ſ.* 2. And if it iſſues without, on motion, it will be quaſhed, with coſts. *Fregatt* v. *Tapſcott.* 2 *Blackſ. Rep.* 919. An *attachment* of *privilege* is amendable, though it is in the nature of an *original writ*, as if there are not fifteen days between the *teſte* and *return*, &c. 1 *Wilſ.* 167.

Of Proceeding by an Attorney PLAINTIFF.

By the 4th ſect. of 13 *Car.* 2. *ſtat.* 2. *c.* 2. [the ſtatute which occaſioned the inſertion of the *ac etiam* clauſe in proceſs to arreſt and hold to *ſpecial bail*] it is provided, "That the ſaid "act, nor any clauſe or thing herein before ſpecified or con- "tained, ſhall not extend, nor be conſtrued or taken to ex- "tend, unto any arreſts hereafter to be made, upon or by vir- "tue of any writ of *capias utlagatum*, attachment upon reſcues, "or attachment upon any contempt, *or of any attachment of* "*privilege, at the ſuit of any privileged perſon*, or of any other "attachment for contempt whatſoever, iſſuing or to be iſſuing "out of either of the ſaid courts, although there be no parti- "cular certainty of the cauſe of action expreſſed or contained "in the ſaid writs; but that nevertheleſs, no ſheriff or under- "ſheriff, nor any of the officers or miniſters aforeſaid, ſhall "diſcharge any perſon or perſons, taken upon any writ of *ca-* "*pias utlagatum*, out of cuſtody, without a lawful *ſuperſedias* "firſt had and received for the ſame; and that, upon the ſaid "writs of *attachment*, ſuch lawful courſe be taken for ſecurity "for appearance therein as hath been heretofore uſed; any "thing herein before expreſſed to the contrary thereof, in any "wiſe notwithſtanding."

By this clauſe it ſhould ſeem, that there is no occaſion for an "*ac etiam*" clauſe in an *attachment of privilege* to hold defend- ant to bail, at the ſuit of an attorney, though ſuch clauſe is uſually inſerted, if the party is to be held to *ſpecial bail.* Vide 2 *Wilſ.* 392.

In B. R.

By *Reg. H.* 20 *Geo.* 2. Every attorney of this court, who ſhall ſue out any attach- ment of *privilege* againſt any defendant, ſhall leave a *præcipe* with the *ſigner of the writs*, with the defendants names, *not exceeding four in each writ*, with the return and day of ſigning ſuch writ, with the agent's or attorney's name who ſued out the ſame. And all ſuch *præ- cipes* ſhall be entered on the roll, where the *præcipes* of *lati- tat*, and all other writs iſſuing out of this court, are entered; and

In C. B.

By *Reg. H.* 11 *G.* 2. You muſt take out a *præcipe*, con- taining the plaintiffs and de- fendants names, *not exceeding four in the whole*, with the re- turn of the writ, day of ſign- ing, and the agent's or attor- ney's name who ſues out the ſame: this *præcipe* you muſt leave with the *prothonotary*, who, without fee or reward, is to enter the ſame on a remem- brance roll, to be kept in his office for that purpoſe; and he is not to ſign any attachment of privilege, unleſs ſuch *præcipe*

Of Proceeding by an Attorney PLAINTIFF.

In B. R.

and the officer who signs the writs in this court shall not sign such attachment, till a *præcipe* be left with him for that purpose.

In *B. R.* you pay nothing for signing the writ; but for sealing it, 7 *d.* to the sealer. *Rich. Att. Pract. B. R.* 410.

The form of the *præcipe* to be left with the *signer of the writs*, is as follows:

Surry. Attachment of privilege for *A. B.* gentleman, one of the attornies, &c. against *C. D. Debt.*

Returned *Wednesday* next after the *morrow of All Souls.*

O. P. agent.
21 *Nov.* 1779.

Affidavit for 50 *l.*

If the *attachment* in *B. R.* requires only a *common appearance*, a copy thereof is served with an English notice, in writing, subscribed as in other cases, and the appearance must be entered with the clerk of the *common bails.*

If it requires *special bail*, a *judge's clerk* takes the recognizance as in other cases.

In C. B.

be left in his office at the time of signing thereof.

In *C. B.* you pay nothing to the *prothonotary* for signing the writ, and only one penny for the seal. *Rich. Att. Pract. C. B.* 258.

Like *præcipe* in this court, to be left with the *prothonotary.*

If the *attachment* in *C. B.* requires only *common bail*, after a copy thereof served, with an English notice in writing, subscribed as in other cases, the appearance must be entered with the *prothonotary:* but if it requires special bail, the *clerk of the docquets* prepares the bail-piece or recognizance, and attends a judge, or the court, where the same is entered into, and the bail justify, or fresh bail is added, in the same manner as the *filazer* does on *mesne process* by *original.*

After judgment, by default on common process, plaintiff may sue out a *special original* to warrant it in case error should be

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be brought. But an attorney has no need to ſue out a new *attachment* of privilege to warrant his judgment. For where judgment was obtained againſt one defendant, on a *joint attachment* of privilege againſt him and others, and he brought error, the court ſaid (upon denying leave to take out a ſeparate attachment to warrant a judgment), that by the practice of *C. P.* the old joint attachment ſeemed to be good and ſufficient to warrant proceedings thereon againſt defendants ſeverally, as would be reported to the *King's Bench*, if they deſired to be informed what was the practice in *C. P.* Vide *Barnes.* 423.

The beginning of a *declaration*, at the ſuit of an attorney in *B. R.* is thus:

Middleſex, to wit. *A. B.* gent. one of the attornies of the court of our lord the king, before the king himſelf, complains againſt *C. D.* being in the cuſtody of the *marſhal* of the *Marſhalſea*, &c. [as in other declarations.]

Add pledges.

In *C. B.* it is in this form:

Middleſex. C. D. late of, *&c.* was *attached* by a writ of our lord the king, of privilege iſſuing out of our court here, to anſwer *A. B.* gent. one of the attornies of the court of our lord the king of the *Bench* here, according to the liberties and privileges of the ſame court; for ſuch attornies and other miniſters of the ſame *Bench*, time out of mind, uſed and approved of in the ſame in a *plea of treſpaſs on the caſe*, &c. and thereupon the ſaid *A.* in his proper perſon, complains, *&c.*

Add pledges.

The ſubſequent proceedings, at the ſuit of an attorney, are the ſame as in other caſes.

If an attorney delivers his declaration *four days* excluſive, before the end of the term, the defendant muſt plead as of that term.

If an attorney delivers his declaration four days excluſive, before the end of the term in which the *attachment* was returnable, and enters a rule to plead, and demands a plea, the defendant ſhall be obliged to plead as of that term; and if he does not deliver his declaration in that time, the defendant is entitled to an *imparlance:*

And if he does not deliver his declaration before the *eſſoign day* of the ſubſequent term, the defendant may have an imparlance to the term next following.

Of Proceeding againſt an Attorney DEFENDANT in the KING'S BENCH.

AN attorney of the *King's Bench* muſt be ſued by *bill*, and cannot be arreſted; and the method of ſuing him is this: The plaintiff files a *bill* againſt him [which is a direct copy of a *declaration* engroſſed on a ſlip of parchment ſtamped with a treble penny ſtamp] with the *clerk of the declarations* in the *King's Bench* office, and then makes a copy thereof on treble penny-ſtampt paper, for the declaration, which muſt be delivered to him with notice thereon to plead; and then the plaintiff proceeds as in other caſes.

A *bill* againſt an attorney is in the following form:

Middleſex, to wit. *A. B.* complains againſt *C. D.* gent. one of the attornies *of the court of our lord the king, before the king himſelf*, preſent here in court in his own proper perſon; for that *Whereas, &c.* [as in other caſes]; and therefore he prays relief, *&c.*

Q. P. for the plaintiff.
The defendant in perſon.

Pledges of proſecuting, { *John Doe*, and *Richard Roe*.

Upon delivery of this *declaration*, and a rule given to plead thereto [either a *four* or *eight* day rule], and the ſame being expired, the plaintiff may ſign judgment; ſo that in the *King's Bench* the remedy againſt attornies is ſpeedier than in the *Common Pleas*, which *vide* the next page; and alſo ſpeedier than againſt other indifferent perſons, as the *bill* and *declaration* are one and the ſame thing, and the firſt commencement of the *ſuit*.

In *B. R.* if the action be laid in *London* or *Middleſex*; and the defendant attorney lives within twenty miles of *London*, upon a rule given to plead, he has *four days* time to plead; and if he reſides above twenty miles from *London*, or the action be laid in any other county than *Middleſex* or *London*, he has *eight days* time to plead.

The bill againſt an attorney concluded, and *thereof he brings ſuit* inſtead of, and *thereof he prays relief*; and on motion to amend, the court of *C. P.* granted the amendment. *Barnes*, 3.

Of Proceeding againſt an Attorney DEFENDANT in the COMMON PLEAS.

AN attorney of the *Common Pleas* alſo muſt be ſued by *bill*, and cannot be arreſted; but the *bill* and *declaration* againſt an attorney are different in this court; for by *Reg. Trin.* 21 *Car.* 2. "*No bill* ſhall be filed againſt an officer, *attorney*, clerk or miniſter of the court, in order to a *forejudger*, *until the bill* be actually entered on record, and a number-roll actually put to the *bill*."

The above rule, however, is in a great meaſure diſuſed, and the method of proceeding at this day againſt an *attorney defendant* is as follows:

The *plaintiff* engroſſes *his bill* on a ſlip of parchment ſtamped with a double penny ſtamp, and carries it to the *prothonotary*, who marks it as entered, on being paid for the entry, and it is thereby ſuppoſed to be entered, though no number-roll is put on *the bill*; which being done, the *bill* muſt be carried to *Weſtminſter-hall*, and given to one of the criers of the court, who calls the defendant in court, for which he is paid 1 *s.* and by 2 vol. *Rules and Orders*, he muſt be called *three* times in court. After which the *plaintiff* gives a rule on the *bill*, with the *ſecondary*, for the *defendant* to appear, for which is paid 1 *s.* 4 *d.* *viz.* 1 *s.* duty, and 4 *d.* the rule; and then *the bill* is filed in the *prothonotary's office*, for which is paid 4 *d.*; upon filing which *bill*, notice thereof muſt be given to the *defendant*, in writing, by *Reg. Hill.* 11 *Geo.* 2. whereby it is ordered, that

"Where a bill ſhall be filed againſt an attorney of the court, no *forejudger* ſhall be entered for want of appearance, if the action be laid in *London or Middleſex*, *and the attorney reſides within twenty miles of London*, until *four days* after notice in writing of filing ſuch bill be given to ſuch attorney, or his agent, or left at his uſual place of abode, and a rule given for ſuch appearance as uſual; and if ſuch attorney *reſides above twenty miles from London*, *or the action be in any other county than London or Middleſex*, no *forejudger* ſhall be entered till *eight days* after ſuch notice ſhall be given, in manner as aforeſaid, and a rule to appear; the ſaid days to be excluſive of the days of giving ſuch notice."

The notice of a bill being filed.

Common Pleas.

A. B.

againſt

C. D. gentleman, one of the attornies, *&c.*

Take notice, that a bill was this day filed in the prothonotary's office of his majeſty's court of *Common Pleas* at *Weſtminſter*, againſt you the defendant *C. D.* at the ſuit of the plaintiff

A. B.

Of Proceeding againſt an Attorney DEFENDANT in the COMMON PLEAS.

A. B. in an action of *treſpaſs upon the caſe upon ſeveral promiſes* [or whatever it is], and unleſs you appear to the ſaid bill on *Wedneſday* the twenty-ſixth day of *January* inſtant, you will be forejudged the court.

23*d January* 1780. *O. P.* attorney for the plaintiff.

To *C. D.* the defendant.

The above is the notice given by the *ſecondary's* rule of the *bill* being filed, the notice to plead is as follows:

Common Pleas.

A. B. againſt *C. D.*

Take notice, that there is left in the prothonotary's office, in the *Inner Temple, London*, a *declaration* againſt you the defendant, at the ſuit of the plaintiff *A. B.* in an action upon the *caſe upon ſeveral promiſes* [whatever the caſe is], which the plaintiff lays to his damage of 100*l.* and unleſs you plead to the ſaid declaration within *four days* next after the firſt day of next *Hilary* term, judgment will be entered againſt you by default.

O. P. attorney for the plaintiff.

To *C. D.* defendant.

Before the above rule for giving the defendant notice, the plaintiff did nothing more than have him called by the *cryer* in court, which was then thought ſufficient, as all attornies were ſuppoſed to be perſonally preſent during the ſitting of the courts but many of the attornies having been ſtruck off the roll on *forejudgers*, for want of other notice; and many living at a diſtance, ſo that it was impoſſible to give orders for an appearance in time before the expiration of the rules to appear, the above rule became neceſſary.

If the defendant appears in time, you deliver a *declaration*, and proceed as in other caſes; but if he does not appear, he muſt be *forejudged*, that is, ſtruck off the roll; to effect which the plaintiff enters his *bill*, and a *forejudger*, on the roll, in the following form, beginning with a *memorandum*, as in ſuits by bill in *B. R.*

Middleſex, to wit. Be it remembered, that on the day of in this ſame term, *A. B.* came here into court by *O. P.* his attorney, and exhibited to the juſtices of our lord the now king, of the *Bench* here, his bill againſt *C. D.*

Of Proceeding againſt an Attorney DEFENDANT in the COMMON PLEAS.

C. D. gentleman, one of the attornies of the court of our ſaid lord the now king, of the *Bench* here, preſent here in court in his proper perſon, in a plea of *treſpaſs on the caſe*; the tenor of which ſaid bill followeth in theſe words (to wit), To the juſtices of our lord the king, of the *Bench*. *Middleſex*, to wit. *A. B.* by *O. P.* his attorney, complaineth of *C. D.* gentleman, *&c.* [the whole bill to] and thereupon he prayeth relief, *&c.*

Pledges for proſecuting, { *John Doe*, and *Richard Roe*.

Whereupon the ſaid *C. D.* being ſolemnly called, came not, therefore he ſtandeth forejudged from exerciſing his office of attorney of this court for his contumacy, *&c.*

You pay the prothonotary 2*s.* for ſigning the *forejudger*, and the *clerk of the warrant* 1*s.* 4*d.* for ſtriking the defendant off the roll, and then you may proceed againſt him as againſt a common perſon.

When once an attorney is *forejudged*, the ſuit *by bill* is at an end, and the plaintiff, if he proceeds, muſt proceed as againſt an indifferent perſon, by *original* and *capias*, in the common way. *Barnes*, 43.; and ſo muſt every other perſon who ſues him.

Defendant being ſued as an attorney of C. P. *by bill*, pleaded in abatement that he is not an attorney. Plaintiff moved to ſet aſide the plea, and had a rule to ſhew cauſe; but it appearing, on ſhewing cauſe by *certificate* from the clerk of the warrants, that defendant was forejudged five years ago, and that that forejudger ſtill remains in force, the rule was diſcharged. *Per Cur.* Defendant is totally deprived of privilege, pending a forejudger; plaintiff may reply as he pleaſes, and traverſe the fact, which is triable by the record, or demur, if he thinks the plea bad. The plea is ſworn to be true, and ſeems not to be frivolous. *Farrill* v. *Head*. *Barnes*, 41.

Plaintiff moved for an attachment againſt P. for acting as an attorney, and pleading pending *a forejudger*, and a rule was made to ſhew cauſe. The day before cauſe ſhewn, P. applied to Mr. Juſtice *F. Aland*, and obtained an order (without ſummons) to be reſtored to his privilege (without payment of coſts), upon entering a common appearance at the parties ſuit by whom he was *forejudged*; and it not appearing that P. had any notice of this old dormant forejudger, obtained ſeven years ago, the rule was diſcharged. *Butler* v. *Pincent*. *Barnes*, 41.

When

Of Proceeding againſt an Attorney DEFENDANT.

When an attorney *defendant* has appeared to a *bill* filed againſt him in court, the ſubſequent proceedings throughout the cauſe are the ſame as in cauſes againſt indifferent perſons; only the writs, ſuch as the *venire*, *habeas corpora*, *diſtringas*, &c. are made returnable *on a day certain in term*, and not on a *general return day*.

It has been ſaid, that proceſs of *execution* againſt an attorney has no occaſion to be made out returnable on a *day certain*; for execution begins when the cauſe is ended.

But a *ca. ſa.* (which was made returnable on a general return, inſtead of a day certain) on motion was quaſhed, and defendant (attorney) ordered to be diſcharged by *ſuperſedeas*, with coſts, he conſenting to bring no action. For *per Cur.* Defendant could not take advantage of this matter on error; and as he could not, it is unreaſonable to keep him in cuſtody till the determination thereof. *Barnes*, 413. So that it is the ſafer way, if it is not abſolutely required, to make the proceſs of *execution*, as well as the *meſne* proceſs, returnable on a day certain.

The plaintiff, *an attorney*, having ſued by his *attachment of privilege*, was nonſuited, and afterwards taken upon a *ca. ſa.* for the coſts; upon the judgment of nonſuit returnable on a *general return day*, and the court held it well enough. For though all proceſs, both for and againſt an attorney, is made returnable on a day certain, becauſe of his daily attendance in court; yet when an attorney is out of court, as in the caſe above, and in cuſtody in execution, he has no day in court, ſo cannot attend; and therefore in ſuch caſe he loſes his privilege to have his proceſs againſt him returnable on a day certain.

Of getting an Attorney diſcharged when arreſted.

IF an attorney is ſued otherwiſe than *by bill*, and arreſted, and in cuſtody, by virtue of proceſs, in order to get his diſcharge, he muſt ſue out his *writ of privilege* from the court wherein he is an *attorney*; and to obtain which he muſt get a *certificate from the maſter's clerk in B. R.* or *clerk of the warrants in C. B.* that the defendant is an attorney of the court, which certificate is an authority for the *ſigner of the writs in B. R. or prothonotary in C. B.* for ſigning the ſame, for which nothing is paid, only 7 *d.* to the *ſealer*; which writ muſt be allowed by the court or ſheriff wherever it is directed, who will thereupon make out a *ſuperſedeas* for the defendant.

But in *C. P.* it was held, that an attorney of *B. R.* arreſted by *capias* on a *ſpecial original*, out of the ſame court, is not entitled to his diſcharge, by ſerving the ſheriff with a *writ of privilege*, but muſt plead it *ſub pede ſigilli*. *Croſsley* v. *Shaw*. *Eaſt*. 16 *Geo*. 3. *C. B.* 2 *Blackſ. Rep.* 1085.

A *writ of privilege* is to the following effect:

GEORGE the Third, &c. *To the judges of our court of our palace at Weſtminſter*, and to every of them greeting: Whereas according to the cuſtom of our court { *of the Bench*, or *before us*, } at *Weſtminſter*, hitherto uſed and approved of in the ſame; the *attornies* of the ſame court { *of the Bench*, or *before us*, } whilſt they are proſecuting or defending ſuits and actions therein for their clients, ought not, nor have they, from time immemorial, been uſed to be compelled to anſwer before any of our juſtices or officers, or any other ſecular judges whatſoever, upon any pleas, plaints, or demands, which do not particularly belong to us (pleas of freehold, felonies, and appeals excepted) ſave only before { *our ſaid juſtices of our ſaid court of the Bench*; or thus, *before us by bill exhibited in our ſaid court before us, and not by writ.* } And *whereas* we have lately received information, by the complaint of *A. B.* gentleman, one of the attornies of our ſaid court { *of the Bench*, or *before us*, } that ſeveral ill-diſpoſed perſons, intending to diſquiet the ſaid *A.* have iſſued forth and proſecuted out of *our court of our palace at Weſtminſter*, one or more writ or writs, returnable before you in the ſame court, or one or more precept or precepts returnable in our ſaid court,

Of getting an Attorney discharged when arrested.

court, before you or one of you, against the said *A.* and threaten to arrest and detain him in your custody thereupon, in suits which do not relate to us (or in pleas of freehold, felonies, or appeals excepted), whereby the said *A. B.* is unable to attend his said office as an attorney, upon several affairs and suits depending in our said court { *of the Bench*, or / *before us*, } which, if it is permitted, will manifestly take away, and be not only in derogation and diminution of the jurisdiction of our said court { *of the Bench*, or / *before us*, } and the liberties and privileges thereof; but also to the great detriment of the said *A.* and his clients. And because we are willing that the jurisdictions, privileges, and customs, for so long time used and approved in our said court { *of the Bench*, or / *before us*, } should be inviolably kept and observed: *We command you*, and every of you, that you desist from taking the said *A. B.* into your custody, upon any writ or writs, precept or precepts: and if the said *A. B.* be detained in your custody by any writ or writs, precept or precepts, other than such as particularly concern us (pleas of freehold, felony, and appeals, only excepted), that then you discharge the said *A. B.* out of your custody, and suffer him to go at large, as you will answer the contrary at your peril; and, that you inform the party or parties, plaintiff or plaintiffs, in the plaint or plaints, that he, she, or they, may prosecute his, her, or their action or actions, suit or suits, { *in our court of the Bench*, or / *before us*, } *by bill* to be exhibited { *to our justices of the said Bench*, or *to us in our said court before us* } at *Westminster*, against the said *A. B.* if he, she, or they, shall think it expedient so to do. *Witness.* &c.

Of

Of Proceeding againſt Officers of the Courts.

ALL the *officers* in the court of *King's Bench*, as well as the attornies, have the privilege of ſuing by *attachment*, and being ſued *by bill* in actions by and againſt them in their own right, and where they are not joined with others, except in pleas *of land*, of which the court of *Common Pleas* alone has juriſdiction.

But the officers of the *Common Pleas*, amongſt whom are the *ſerjeants*, *prothonotaries*, *ſecondaries*, *clerks of the prothonotaries*, *ſerjeants clerks*, *clerks of the judges*, *&c.* have not the privilege of being ſued there *by bill* as attornies have, but the privilege of being ſued there in every ſuit [except *appeals*] by *original writ*, becauſe they are ſuppoſed not to be always preſent in perſon in court, as attornies are *Baker* v. *Swindon*. Ld. *Raym.* 399. 3 *Salk.* 283. 1 *Barnes*, 280. *Holt*, 589 *Adj.* P. 6 *W.* & *M. C. B. Windford. Rot.* 685. *Baker* v. *Duncalf*, 3 *Lev.* 398.

But it was agreed in *Serjeant Scrogg's* caſe, that the privilege of *C. B.* which *ſerjeants* claimed, extended only to inferior courts, and not to the courts of *Weſtminſter Hall*; and that he may be ſued in either of theſe, becauſe he is not confined to that court alone, but may practiſe in any other court. 3 *Salk.* 282. 1 *Mod.* 298.—But it is otherwiſe as to *attornies* or *filazers*, who cannot practiſe in their own name in any other court but ſuch as they reſpectively belong to; and that therefore a *ſerjeant at law* is to be ſued by *original*, and not *by bill* of privilege. 2 *Lev.* 129. 3 *Keb.* 424. 4 *Mod.* 226. So of the ſervant of a ſerjeant at law. *Cro. Car.* 84.

The *judges* have privilege of being ſued in their own court. *Vide* 3 *Leon.* 149.

But if the chief juſtice of the *King's Bench* or *Common Pleas* bring an action there, the *placita* muſt be before the other three judges, omitting the chief. *Ld. Raym.* 778. otherwiſe it would be erroneous. 8 *Hen.* 6. 81. *Salk.* 398.

Defendant pleaded his privilege as a ſerjeant, with a writ annexed: but for want of an affidavit that he had buſineſs in *C. P.* and there only, the court ſet it aſide. *Stiles* v. *Mead. Stra.* 738.

Per Holt, *privilege* is either of *court* or of *proceſs*; perſons belonging to the court, as attornies, *&c.* have the privilege of court, that is of being ſued there and not elſewhere.—But none ſhall be allowed the privilege of *proceſs*, but thoſe who are *officers* of the court, and are ſuppoſed to be always there. 3 *Salk.* 283.

Of

Of the Privileges of Peers and Members of Parliament.

PEERS are created, as is ſaid in our *law books*, for two reaſons: 1. *Ad conſulendum.* 2. *Ad defendendum regem*, for which reaſons the law gives them certain great and high privileges. *Vide* 7 *Rep.* 34. 9 *Rep.* 49. 12 *Rep.* 96.

1. At the ſuit of the ſubject their bodies ſhall not be *arreſted*, neither *capias* nor *exigent* lies againſt them.

2. For the honour and reverence which the law gives to nobility, their bodies are not ſubject to torture *in cauſâ criminis læſæ majeſtatis.*

3. They are not to be ſworn in *aſſizes*, *juries*, or *other inqueſts.*

4. If any ſervant of the king, named in the *cheque-roll*, compaſs or intend to kill any lord of parliament, or other lord of the king's council, this is *felony.*

5. In the *Common Pleas*, a lord of parliament ſhall have *knights* returned on his jury. [This privilege is taken away by *ſtat.* 24 *Geo.* 2. *c.* 18. *ſ.* 4.]

6. He ſhall have day of grace.

7. A lord of parliament ſhall not be tried in caſe of *treaſon*, *felony*, or *miſpriſion* of them, but by thoſe who are noble and peers of the realm.

8. In trial of a peer, the lords of parliament ſhall not ſwear, but they may give their judgment *ſuper fidem et ligeantiam Domino Regi debitam*, ſo that their *faith and allegiance ſtands* in equipage with *an oath* in the caſe of a common perſon in trial of life. And the writs of parliament, directed to the lords of parliament, are *ſub fide et ligeantia, &c.* And the reaſon and cauſe that the king gives them many other privileges, is for this, becauſe all honour and nobility is derived from the king, as the true fountain, and he honours with nobility for two cauſes. 1. *Ad conſulendum*, and for that reaſon he gives them a robe. 2. *Ad defendendum regem et regnum*, and for that cauſe he gives them a ſword. 12 *Rep.* 96.

In *Jenkins* [107] the following privileges are laid down as belonging to *peers*. 1. They are entitled to *a letter miſſive**. 2. They have a knight to try any iſſue which concerns them [but now this is taken away by the ſtat. 24 *Geo.* 2.] 3. They

* That is, when they are proceeded againſt in Chancery, the lord chancellor is to ſend them a letter, to requeſt his appearance, together with a copy of the bill; but if he does not appear upon the letter, then a *ſubpœna* goes as againſt others.

are

Of the Privileges of Peers and Members of Parliament.

are not to be arreſted for debt, treſpaſs, or other perſonal action. 4. They are exempted from ſerving on juries. 5. To have no day of grace againſt them. 6. Upon the trial of a peer for treaſon or felony, his peers try him upon their honour only, and not upon oath. 7. When they paſs through any of the king's foreſts to attend upon the king, upon blowing a horn, they may have a buck or doe, as the ſeaſon of the year is. 8. They have power, in their houſe, to reverſe judgments given in the *King's Bench*. 9. They have the benefit of clergy, though they cannot read. 10. They are not liable to find carriages for the king when he removes from one place to another.—— Many of theſe privileges are now obſolete.

All *peers*, without any diſtinction as to degree or rank, are entitled to the privilege of peerage alike; for they are equally obliged to attend the ſervice of the publick, and are always ſuppoſed amenable to juſtice, and to have ſufficient property to anſwer in ſuits and actions brought againſt them; and for theſe reaſons, are not to be arreſted or moleſted in their perſons. *Bacon's Abr. tit. Privilege*, 4 *Vol.* 228.

This privilege from arreſts extended formerly to *abbots*, as it does to *biſhops* *, *members of the Convocation, and members of the Houſe of Commons at this day.*

The *privilege* of parliament, according to the *law of parliament*, is of a very extenſive nature, as may be ſeen by various reſolutions and orders, in the *journals* of both the houſes: but various ſtatutes which parliament has condeſcended to make, have taken away many privileges which were heretofore claimed. However, there is one ſtanding reſolution and order in the journals of both the houſes, that no court whatever ſhall preſume to determine concerning the *privilege* of parliament, as ſettled by the rules and orders of each houſe, they themſelves claiming to be the ſole judges of their reſpective privileges; of which order, the king's courts incidently take notice.

The *privilege of a peer* from arreſts extends only to peers of *England*, ſo that a nobleman of any other country, or a lord of *Ireland*, hath not any other privilege in this kingdom than a common perſon. Alſo the ſon and heir apparent of a nobleman is not entitled to the privilege, which is confined to ſuch perſons as are *lords of parliament* at the time. But it ſeems that an

* Eq. Caſ. Ab. 349. 3 Chan. Rep. 38.

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infant peer is privileged from arreſts, his perſon being held ſacred. *Co. Lit.* 156. 2 *Inſt.* 48. 3 *Inſt* 30. *pl.* 19.

The *peers of Scotland* had no privilege in this kingdom before the *union*; but by the twenty third article of the union, the *ſixteen elected peers* ſhall have all the privileges of the *peers of the parliament of Great-Britain*. Alſo, all the reſt of the *peers of Scotland* ſhall have all the privileges of the peerage of *England*, excepting only that of ſitting and voting in parliament. *Stat.* 5 *An. c.* 8. 2 *Stra.* 990. *Fort.* 163. *P. Wil.* 583. Since which ſtatute, the perſon of a *Scotch peer* has been held to be privileged from arreſts.

The twenty-third article of the union, upon which this privilege is claimed by a *peer of Scotland*, not one of the ſixteen, ſays, that the *peers of Scotland* ſhall have all the privileges of *peers of Great-Britain*, except the right and privilege of ſitting in the *Houſe of Lords, and the privileges depending thereon*. Now, as every *privilege*, claimed by a *peer*, ſolely depends, and is in conſequence of his ſitting in parliament, that is, being an *actual lord of parliament*, it ſeems, that the allowing *all the Scotch peers* the privilege from arreſts, is not within the words of the act of union, the only law under which the *Scotch peers* to this day can claim any privilege here at all. However, peers of *Scotland* always claim privilege, and in all caſes are proceeded againſt as peers of *England* are. But I do not know that there has ever been a *judicial* determination on the ſubject.

A *peereſs by birth* is entitled to *privilege*. 2 *Inſt.* 50. *Sty.* 222. 234. 252. *Fort.* 162. *Vent.* 298. *Eq. Caſ. Abr.* 349. *Co. Lit.* 16. *a.* 6 *Rep.* 53. *b.* *Dy.* 79. *pl.* 51. Order of the *Houſe of Peers*, 21 *Feb.* 1692. But it was doubted whether a *peereſs by patent* only for life is entitled to this privilege. *Sty.* 234. 252. Held that ſhe is not entitled, *Sty.* 254. but adjourned.

A *peereſs by marriage* is entitled to *privilege*, and that as well during the coverture, as after: But as a *peereſs by marriage* loſes her dignity by marrying a commoner, after ſuch marriage ſhe is not entitled to any *privilege*. *Co. Lit.* 16. 6 *Co.* 53. *Dyer*, 79.

In lord *Banbury*'s caſe, it was holden by *Holt* ch. juſt. that where a perſon is called *by writ* to the *Houſe of Peers*, he is a peer till he ſits in parliament, the writ giving him no nobility or honour; but that it was ſitting in the *Houſe of Lords*, and aſſociating with them, that ennobled his blood; and that therefore, if the king or he dies before the parliament meets, the writ is determined, and the party remains a commoner: but he

Of the Privileges of Peers and Members of Parliament.

held it otherwiſe in a creation by *letters patent*, by which the party is immediately noble without any other act or ceremony; and though the parliament never meets, or the king dies, the nobility remains to him and his poſterity, according to the limitations in the patent.

Formerly, the *privilege* from arreſts extended to the ſervants of *peers*; and was alſo claimed by their tenants in old times. And the horſes, and other goods and chattels of peers, were privileged from diſtreſſes. But theſe *privileges* have been either aboliſhed by ſtatute, or have become obſolete from not being claimed.

If a commoner who has been held to ſpecial bail, moves to be diſcharged on *common bail*, the court will not grant a *rule* to ſhew cauſe, upon an *affidavit* only: but upon the attendance of the clerk of the crown, or his deputy, with the ſheriff's return, then they will order the rule to go. *Fenwick* v. *Fenwick*. *Mich.* 2 *Geo.* 3. 2 *Blackſ. Rep.* 788.

The *privilege* of parliament does not extend to high treaſon, felony, breach of the peace, or ſurety of the peace. 4 *Inſtit.* 25. 2 *Hawk. P. C.* 424.

The privilege of a *peer* commences from the *teſte* of the *writ of ſummons*, or date of the *letters patent*; and the privilege of a *Commoner* immediately upon his election; but if he be arreſted, or in execution, before his election, he ſhall not have privilege as to that ſuit.

By 12 & 13 *W.* 3. *c.* 3. An act for preventing any inconveniences that may happen by privilege of parliament, it is enacted, "That any perſon or perſons may commence or proſecute any action or ſuit, in any of his majeſty's courts of record *at Weſtminſter*, &c. againſt any peer of the realm, or lord of parliament; or againſt any of the knights, citizens, and burgeſſes of the *Houſe of Commons*, for the time being; or againſt their or any of their menial or other ſervants, or any other perſon entitled to the privilege of parliament, at any time from and immediately after the diſſolution or prorogation of any parliament, until a new parliament ſhall meet, or the ſame be re-aſſembled; and from and immediately after any adjournment of both houſes of parliament, for above the ſpace of *fourteen days*, until both houſes ſhall meet or re-aſſemble: And that the ſaid reſpective courts ſhall and may, after ſuch diſſolution, prorogation, or adjournment as aforeſaid, proceed to give judgment, and to make final orders, decrees, and ſentences, and

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award execution thereupon; any privilege to the contrary, *&c.*"

Provided, "That this act ſhall not extend to ſubject the perſon of any of the knights, citizens, and burgeſſes of the *Houſe of Commons*, or any other perſon entitled to the privilege of parliament, to be arreſted during the time of privilege. Nevertheleſs, if any perſon or perſons, having cauſe of action or complaint againſt any peer of this realm, or lord of parliament, ſuch perſon or perſons, after any diſſolution, prorogation, or adjournment as aforeſaid; or before any ſeſſion of parliament, or meeting of both houſes as aforeſaid, may have ſuch proceſs out of his majeſty's courts of *King's Bench*, *Common Pleas*, and *Exchequer*, againſt ſuch peer or lord of parliament, as he or they might have had againſt him, out of the time of privilege. And if any perſon or perſons, having cauſe of action againſt any of the ſaid knights, citizens, or burgeſſes, or any other perſon entitled to the privilege of parliament, after any diſſolution, prorogation, or adjournment as aforeſaid; or before any ſeſſions of parliament, or meeting of both houſes as aforeſaid, ſuch perſon or perſons may proſecute ſuch knight, citizen, or burgeſs, or other perſon entitled to the privilege of parliament, in his majeſty's courts of *King's Bench*, *Common Pleas*, or *Exchequer*, by ſummons and diſtreſs infinite *, or by *original bill*, and ſummons, attachment and diſtreſs infinite thereupon, to be iſſued out of any of the ſaid courts of record, which the ſaid reſpective courts are hereby empowered to iſſue againſt them, or any of them, until he or they ſhall enter a common appearance, or file common bail to the plaintiff's action, according to the courſe of each reſpective court. And any perſon or perſons, having cauſe of ſuit or complaint, may, in the times aforeſaid, exhibit any bill or complaint againſt any peer of this realm, or lord of parliament: or againſt any of the ſaid knights, citizens, or burgeſſes, or other perſon entitled to the privilege of parliament, in the high *court of Chancery*, *court of Exchequer*, or *duchy court of Lancaſter*, and may proceed thereon, by letter or ſubpœna, as is uſual, *&c.* "But not to arreſt the body of any knight, *&c.*"

By ſect. 3. "That where any plaintiff ſhall, by reaſon or occaſion of any privilege of parliament, be ſtayed or prevented

* Theſe words, "by ſummons and diſtreſs infinite," refer to proceedings by *original writ*.

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from proſecuting any ſuit by him commenced, ſuch plaintiff ſhall not be barred by any ſtatute of limitation, or nonſuited, diſmiſſed, or his ſuit diſcontinued, for want of proſecution of the ſuit by him begun; but ſhall, from time to time, upon the riſing of the parliament, be at liberty to proceed to judgment and execution."

By ſect. 4. "No action, ſuit, *&c.* commenced againſt the king's original and immediate debtor for the recovery of any debt, *&c.* to the crown, ſhall be ſtayed or delayed by or under the colour or pretence of any privilege of parliament;" yet ſo neverthelefs, "that the perſon or perſons, of any ſuch debtor or accountant, or perſon anſwerable or liable to account, being a peer of this realm, or lord of parliament, ſhall not be liable to be arreſted or impriſoned, by or upon any ſuch ſuit, order, *&c.* or being a member of the *Houſe of Commons*, ſhall not, during the continuance of the privilege of parliament, be arreſted or impriſoned by or upon any ſuch order, decree, judgment, proceſs, or proceedings."

By the 2 & 3 of *Anne*, *c.* 18. An act for the further explanation and regulation of privilege of parliament, in relation to perſons in publick offices, it is enacted, "That any action or ſuit may be commenced or proſecuted againſt any officer or perſon entruſted or employed in the revenue, *&c.* for any forfeiture, miſdemeanour, or breach of truſt, *&c.* and ſhall not be ſtayed or delayed by or under colour or pretence of any privilege of parliament, although ſuch officer or perſon be a peer of the realm, or lord of parliament, or one of the knights, *&c.*"

Provided, "That nothing therein ſhall extend to ſubject the perſon of ſuch officer, being a peer of the realm, or lord of parliament, to be arreſted or impriſoned: but that all proceſs ſhall iſſue againſt ſuch officer or perſon, being a peer of the realm, or lord of parliament, as ſhould have iſſued againſt him out of the time of privilege: nor ſhall extend to the perſon of ſuch officer, being a knight, citizen, or burgeſs of the *Houſe of Commons*, to be arreſted or impriſoned during the time of privilege of parliament; and that againſt ſuch officer or other perſon, being a knight, citizen, or burgeſs of the *Houſe of Commons*, entitled to privilege, ſhall be iſſued ſummons and diſtreſſes infinite; which the ſaid reſpective courts are hereby empowered to iſſue in ſuch caſe, until the party ſhall appear upon ſuch proceſs, according to the courſe of ſuch reſpective courts."

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The act of 12 & 13 *W.* 3. *c.* 3. reſtraining only the privilege of parliament, in actions or ſuits commenced in the courts therein ſpecified, by the 11 *Geo.* 2. *c.* 24. in amendment of the act of king *William*, it is enacted, "That any perſon and perſons ſhall and may commence and proſecute, in *Great Britain* or *Ireland*, any action or ſuit in any court of *Record*, or court of *Equity*, or court of *Admiralty*; and in all cauſes matrimonial and teſtamentary, in any court having cognizance of cauſes matrimonial or teſtamentary, againſt any peer or lord of parliament of *Great Britain*; or againſt any of the knights, citizens, and burgeſſes of the *Houſe of Commons* of *Great Britain* for the time being, or againſt them and any of their menial and other ſervants, or any other perſon entitled to the privilege of the parliament of *Great Britain*, at any time from and immediately after the diſſolution or prorogation of any parliament, until a new parliament ſhall meet, or the ſame be re-aſſembled; and from and immediately after any adjournment of both houſes of parliament, for above the ſpace of *fourteen days*, until both houſes ſhall meet or re-aſſemble; and the ſaid reſpective courts may proceed, *&c.*"

Provided, "That the ſaid act ſhall not extend to ſubject the perſon of any knight, *&c.* to be arreſted during the time of privilege. And ſect. 2. authorizes proceeding as above in any of the courts *of great ſeſſions in Wales*, *courts of ſeſſion in the counties palatine of Cheſter*, *Lancaſter*, *and Durham*; *the courts of King's Bench*, *Common Pleas*, and *Exchequer*, in *Ireland*, after any ſuch diſſolution, *&c.* And the *court of Chancery* in *Ireland*, and *equity of Exchequer*, are authorized to proceed in like manner as the *court of Chancery*, and *equity court of Exchequer* in *England* may, againſt any *peer*, *knight*, &c. after ſuch diſſolution, *&c.*"

Sect. 3. ſaves the ſtatute of *limitations* in like manner as the act of king *William*.

And by ſect. 4. No action or ſuit commenced againſt the *king's debtor*, &c. to be ſtayed in any court in *England* or *Ireland* [as by ſect. 4. in the act of king *William*].

And laſtly, by the *ſtat.* 10 *G.* 3. *c.* 50. the preamble of which ſtates, that the acts already in being are inſufficient to obviate the inconveniencies ariſing from delay of ſuits, by reaſon of the privilege of parliament, it is enacted, "That any perſon or perſons ſhall and may, *at any time*, commence and proſecute any action or ſuit, in any court of *Record*, or court of *Equity*, or of *Admiralty*; and in all cauſes matrimonial and

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teſtamentary, in any court having cognizance of cauſes matrimonial and teſtamentary, againſt any peer, or lord of parliament of *Great Britain*; or againſt any of the knights, citizens, or burgeſſes, and the commiſſioners for ſhires and burghs of the *Houſe of Commons* of *Great Britain* for the time being; or againſt their or any of their menial or any other ſervants, or any other perſon entitled to the privilege of parliament of *Great Britain:* and no ſuch action, ſuit, or any other proceſs or proceeding thereupon, ſhall, at any time, be impeached, ſtayed, or delayed, by or under colour or pretence of any privilege of parliament."

2. Provided that "Nothing in this act ſhall extend to ſubject the perſon of any of the knights, citizens, and burgeſſes, or the commiſſioners, *&c.* for the time being, to be arreſted or impriſoned upon any ſuch ſuit or proceedings."

3. And whereas the proceſs by *diſtringas* is dilatory and expenſive: For remedy thereof, be it enacted, "That the court out of which the writ proceeds, may order the iſſues levied, from time to time, to be ſold; and the money ariſing thereby to be applied to pay ſuch coſts to the plaintiff as the ſaid court ſhall think juſt, under all the circumſtances, to order; and the ſurplus to be retained until the defendant ſhall have appeared, or other purpoſe of the writ be anſwered."

4. Provided always, when the purpoſe of the writ is anſwered, that then the ſaid iſſues ſhall be returned; or if ſold, what ſhall remain of the money ariſing by ſuch ſale ſhall be repaid to the party diſtrained upon.

5. And it is further enacted, "That obedience may be enforced to any rule of his majeſty's court of *King's Bench*, *Common Pleas*, or *Exchequer*, againſt any perſon entitled to privilege of parliament, by diſtreſs infinite, in caſe any perſon or perſons, entitled to the benefit of ſuch rule, ſhall chuſe to proceed in that way": and the laſt clauſe extends them to *Scotland*.

The only way by which courts of juſtice could anciently take cognizance of privilege of parliament, was by *writ of privilege*, in the nature of a *ſuperſedeas*, to deliver the party out of cuſtody when arreſted in a *civil* ſuit. For when a letter was written by the ſpeaker to the judges, to ſtay proceedings againſt a privileged perſon, they rejected it as contrary to their oath of office. But ſince the ſtatute 12 *W.* 3. which enacts, that no privileged perſon ſhall be ſubject to arreſt or impriſonment, it hath been held that ſuch arreſt is irregular *ab initio*, and that

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the party may be diſcharged upon motion. It is to be obſerved too, that there is no precedent of any ſuch *writ of privilege*, but only in *civil* ſuits; and that the ſtatutes of 1 *Ja.* 1. *c.* 13. and 12 *W.* 3. *c.* 3. (which remedy ſome inconveniences ariſing from privilege of parliament), ſpeak only of *civil* actions. And therefore the claim of privilege hath been uſually guarded with an exception as to the caſe of *indictable crimes*; or, as it hath been frequently expreſſed, of *treaſon*, *felony*, and *breach* (or ſurety) *of the peace*. So that no privilege was or is allowable, in any *crime* or *miſdemeanour* whatſoever; for theſe are treated of by the law as being *contra pacem domini regis*.

In *criminal* caſes, or *contempts*, a peer has no privilege.

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BY the ſtatute 11 *Geo.* 3. before mentioned, the *privilege* is wholly taken away from the ſervants of *peers and members of parliament*, ſo that they may be proceeded againſt as other indifferent perſons—and *ſuits* may now alſo, ſince the above ſtatute, be commenced at any time, whether the parliament is ſitting or not ſitting, againſt any *peer or member* thereof.

Peers and members of parliament may be proceeded againſt *two ways*, *viz.* by *original writ*, and by *original bill* [according to the 12 & 13 *Will.* 3.], in either court, except that they cannot be proceeded againſt by *original writ* in *B. R.* in all actions; but in thoſe actions only, ſuch as *caſe*, *treſpaſs*, *ejectment*, *replevin*, and *debt*, which the *King's Bench* can hold plea of by *original writ*.

If the plaintiff proceeds by *bill* againſt a peer or member of parliament, he muſt file his *original bill*, containing the whole cauſe of action againſt him, with the *clerk of the declarations*, *if in the King's Bench*; or with the *prothonotary*, *if in the Common Pleas*.

The *original bill* is to this effect:

Middleſex, to wit. *A. B.* complains of the Right Honourable *John* earl of —— (or if againſt a commoner, of *C. D.* Eſq;), having privilege of parliament, for that, &c. (reciting the cauſe of action as the caſe happens to be), to the damage of the ſaid *A. B.* of 1000 pounds, and therefore he brings ſuit; and hereupon the ſaid *A. B.* prays the proceſs of the lord the king, according to the form of the ſtatute in ſuch caſe made and provided, to him thereon to be made, and it is granted to him, &c.

Pledges, { *John Doe*, and *Richard Roe*.

The ſummons thereon is to this effect:

George the Third, &c. To the ſheriff of *Middleſex*, greeting. We command you, that you cauſe to be ſummoned (naming the defendant), having privilege of parliament, that he *be before us* (or before our juſtices if in *C. B.*) on next after to anſwer to *A. B.* in a plea of (as the caſe is), as he ſhall be able reaſonably to ſhew that he ought to anſwer therein, and have there this writ. Witneſs, &c.

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In the *King's Bench*, the ſummons and its ſubſequent proceſs, *attachment* and *diſtringas*, when the ſuit is *by bill*, do not ſtate the cauſe of action at large, but only generally, as "*to anſwer the ſaid* A. B. *in a plea of treſpaſs on the caſe to his damage of*," &c. or that he *render to the ſaid* A. B. 1000 *l.* as the caſe is. Whereas if the ſuit is by *original*, the *ſubſequent* proceſs of *diſtringas* thereon ſtates the cauſe at large as in the *original writ*. And in *C. B.* whether the proceedings are by *bill* or *original*, all the proceſs thereon ſtates the whole as in the *original bill* or *writ* filed.

The *ſummons* and other proceſs, when by *bill*, need not have *fifteen* days between the *teſte* and *return*, though it muſt be made returnable on a day certain. But when by *original*, they muſt have fifteen days between the *teſte* and *return*, and muſt be made returnable on a *general return*.

If the plaintiff proceeds by *original*, againſt a *peer* or *commoner*, the plaintiff makes out a *præcipe*, as inſtructions for the *curſitor* to frame the *original writ*. This writ muſt then be delivered to the ſheriff, who will cauſe the defendant, if within his bailiwick, to be ſummoned thereupon. A copy of the *original* is uſually made out by plaintiff's attorney for the ſheriff, and that is ſerved as the *ſummons* on the defendant.

Upon the return of the *original*, it is filed with the *filazer* if in *B. R.* or *cuſtos brevium* if in *C. B.* and if the defendant appears, the proceedings are the ſame as in other caſes; but if he does not appear, and ſhould caſt an *eſſoign*, which it ſeems he may do any time before the return of the *original writ*, but not afterwards, the plaintiff is delayed a whole term, as the defendant has till the firſt return of the next term to appear; and then, ſhould the defendant not enter an appearance, the *eſſoign* muſt be adjourned to a further day by the plaintiff; upon which day, and the like default, the plaintiff may then ſue out a *diſtringas*. However, the caſting an *eſſoign* is ſeldom done at this day, as the courts ſet themſelves againſt ſuch obſolete practice, and conſider it nothing more than a trick, calculated for the purpoſe of delay, and a great abuſe of the law; and ſhould the practice of *eſſoigns* be revived, there is no doubt but that the courts would inſtantly make ſuch new rules and orders, as would effectually prevent their occaſioning that unneceſſary delay of juſtice which they formerly did. *Vide* the caſes of *Anſon* v. *Jefferſon*, *C. B.* 2 *Wilſ.* 164.—And *Barclay* v. *Earle*. *Stra.* 1194.

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Should no *appearance* be entered upon the return of the *original*, or *eſſoign* caſt, the plaintiff's attorney makes out a *præcipe* for a *diſtringas*, and carries it to the proper *filazer*, to draw out the ſame, which muſt be ſealed; and is in the following form:

GEORGE the Third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, *&c.* To the ſheriff of *Middleſex*, greeting. We command you, that you diſtrain *A. B.* Eſq; having privilege of parliament, by all his lands and chattels in your bailiwick, ſo that neither he, nor any one for him, do intermeddle therewith, until you ſhall have other command in that behalf from us; and that you anſwer us for the iſſues of the ſame, ſo that you have his body *before us* [or if in *C. B. before our juſtices* at *Weſtminſter*, on ——— *a general return day*], to anſwer *C. D.* in a plea of, *&c.* [*reciting the original as before*], to the damage of the ſaid *C.* of one hundred pounds; and have you there then this writ.

Witneſs, *&c.* this ——— day of ——— in the twentieth year of our reign.

If the defendant does not appear at the return of the *diſtringas*, the plaintiff's attorney muſt call upon the ſheriff to return the *writ*, whereupon he may ſue out an *alias*; and, upon the return of that, a *pluries diſtringas*. But inſtead of proceeding as formerly, by the writ of *diſtringas ad infinitum*, the plaintiff may now move the court out of which the writ iſſues, by virtue of the 10 *Geo.* 3. *c.* 50. *ſ.* 3. for the ſheriff to enlarge the *iſſues*, which the court will accordingly order to be increaſed, to the amount of the plaintiff's demand.

This motion is a *common motion*, and requires neither notice nor affidavit.

The courts uſed upon motions to encreaſe the *iſſues*, to order double the iſſues returned from time to time, and not farther to encreaſe the ſame. But the *King's Bench* and *Exchequer* having done more, the court of *Common Pleas*, to be in conformity *with them*, order them to be encreaſed to more than double; and, on motion to encreaſe iſſues on the *pluries diſtringas* to a good ſum (an affidavit being produced that the debt was 150 *l.*), they ordered iſſues to be returned on the *pluries diſtringas* to 20*l.* *Barnes*, 418.

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And where the debt appeared by affidavit to be 1950*l.* and 40 ſhillings had been returned on the firſt *diſtringas*, the court, on motion, made a rule that the ſheriff ſhould return 20*l.* iſſues on the *alias*. *Barnes*, 420. And afterwards, on motion to encreaſe the iſſues on the *pluries* to five times as much as the laſt (the uſual way in *C. B.*) they were ordered to be encreaſed to 100*l.* and afterwards, on the *pluries*, to 500*l.*

On motion to encreaſe iſſues, it is diſcretionary in the court to order the amount; and they may order to the full amount on the firſt motion, if they think proper. And the courſe of the *King's Bench* is now, on motion, to order the amount of the whole debt to be levied on the *alias*.

The plaintiff, in an action againſt a member of parliament, had proceeded agreeable to the act of 10 *Geo.* 3. *c.* 50. and had obtained rules for ſelling the iſſues levied upon a *diſtringas*, *alias*, and *pluries*; and alſo a rule for an attachment againſt the ſheriff: but no iſſues had been actually levied; and at length defendant appeared; whereupon it was moved, that theſe rules ſhould all be diſcharged. For as no iſſues had been levied, they could not be *ſold* [*vide* ſect. 3. of the ſtatute 10 *Geo.* 3. *c.* 50.]; and as the defendant in the action had now appeared, the end and purpoſe of the writs were anſwered. On the other ſide, the plaintiff inſiſted on the coſts of iſſuing the writs, before the rules ſhould be diſcharged. And the court thought that reaſonable; and directed, that *on payment of coſts* the rules ſhould be diſcharged. They were of opinion, that theſe coſts were not to attend the event of the ſuit, but were to be paid to the plaintiff at all events, whether he ſhould finally ſucceed in his ſuit or not. *Martin* v. *Townſend and Sawbridge*. *Burr. Rep.* 4 *pt.* 2725.

The form of the declaration againſt a *peer or commoner* by *original*, is thus:

Middleſex. *A. B.* Eſq; [or whatever his title is], having privilege of parliament, was ſummoned to anſwer *C. D.* in a plea, *&c.*

And if by *bill*,

Middleſex, to wit. *C. D.* complains againſt *A. B.* Eſq; having privilege of parliament, *&c.*—and though the ſuit is in the *King's Bench by bill*, the defendant muſt not be declared againſt,

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againſt, "*as being in the cuſtody of the marſhal of the Marſhalſea.*" *Sayer Rep.* 63, 64.

If the declaration ſhould be in an *action of aſſumpſit* againſt a *peer*, the plaintiff muſt take care, in aſſigning the breach, not to uſe the following words, as is uſual againſt a common perſon; "*but contriving, and fraudulently intending, craftily and* "*ſubtily, to deceive and defraud the ſaid* C. D *in this behalf*;" for the *Houſe of Lords* have adjudged it a very high contempt and miſdemeanour in any perſon, to charge their noble body with any ſpecies of fraud or deceit. But in ſuch caſe, againſt a *member of the Houſe of Commons*, thoſe words may be inſerted, as there is no ſtanding order to the contrary; the reſentment of the members of that honourable houſe having never yet been irritated at the charge.

A *bill of Middleſex* was iſſued out of *B. R.* by an attorney of the court, againſt the *counteſs of Huntingdon*, which was diſcharged by *ſuperſedeas*, without pleading, becauſe it appeared by the record that ſhe was a peereſs; and the attorney was committed for ſuing out the proceſs. *Vent.* 298.

In *Trinity term*, 18 *George* 2. in the *King's Bench*, in the caſe of *Goſling and wife, againſt lord viſcount Weymouth*, it was argued, whether a *peer* could be ſued there by *bill of privilege*. And adjudged that he might. The caſe was:

Plaintiffs commenced an action againſt lord *Weymouth*, *by bill of privilege*, to which he pleaded in abatement, that he ought to have been ſued by *original writ*, and *not by bill of privilege*; and thereupon there was a *demurrer and joinder*. On the argument of which, the court relied on the caſe of *Say* againſt lord *Byron* in that court, a few years before, and awarded a *reſpondeas ouſter*.

The caſe of *Say* and lord *Byron* came on before *B. R.* on a motion to ſet aſide a *diſtringas* iſſued againſt lord *Byron by bill*, and the court having directed precedents to be ſearched, found, that it had been the uniform practice and uſage to proceed againſt *peers* in that court *by bill of privilege*, before the ſtatute 12 & 13 *W.* 3.; and as that act made no difference in that reſpect, it was held, that the juriſdiction of the *King's Bench* remained as before.

It is, however, very remarkable, that when the act of king *William* went to the *lords* for their concurrence to the proceedings therein, againſt the members of both houſes, *by bill and ſummons*

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ſummons thereon, the *lords* expunged that part of the clauſe relating to themſelves being ſued by *original bill and ſummons*, and ſent back the amended bill to the commons; which afterwards paſſed accordingly. Which clearly proves, that the *lords*, at that time, did not think themſelves included therein.

The court therefore, relying on their juriſdiction before the ſtatute of king *William*, determined that a *peer* may be ſued by *bill* in *B. R.* but as this determination is founded ſolely on the juriſdiction of the court, and the uniform practice thereof before the ſtatute, it may be ſtill a queſtion in the court of *Common Pleas*, whether a *peer* can be ſued there by *original bill and ſummons thereon* *.

All the ſubſequent proceedings to the declaration againſt a *peer or privileged perſon* are the ſame as in other caſes, except that their bodies cannot be taken *in execution*, unleſs the judgment is obtained upon a *ſtatute ſtaple*, or *ſtatute merchant*, *or upon the ſtatute of* Acton Burnell, 11 *Edw.* 1. and then a *capias ad ſatisfaciendum* lies even againſt peers of the realm.

A motion was made by *Lord Banbury* for a *ſuperſedeas* to a *latitat*, which had iſſued againſt him by the name of *Charles Knollys*. But the court denied the motion, and the chief juſtice ſaid, they could not take notice that this *Charles Knollys* is *earl of Banbury:* and that there was a difference between this caſe

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* But in *C B.* a member of parliament was ſued by *original bill and ſummons* thereon, and after judgment for plaintiff, error was brought thereon into *B. R.* general errors aſſigned. Objected, that the *Common Pleas* could not hold plea againſt a member of parliament by *bill*, which depends on ſtatute 12 & 13 *W.* 3. *Sed per Cur.* On looking into the ſtatute, the intent of the parliament muſt be collected from the words, and they are expreſs, that a member of parliament may be ſued in either of the courts, by ſummons and diſtreſs infinite (which refers to proceedings by original writ), or by original bill and ſummons, attachment and diſtreſs, thereupon to be iſſued out of any of the ſaid courts, which they are empowered to iſſue. Then the words, according to the courſe of each reſpective court, refer only to entering the common appearance or filing common bail. Then by the *proviſo*, that nothing in that act ſhould give any juriſdiction or power to any court to hold plea in any *real* or *mixt* action, in any other manner than ſuch court might have done before the making that act, they deſigned to give a juriſdiction to hold plea in *perſonal* actions, in another manner than they could have done before. Judgment affirmed. *Dawſon* v. *Burridge*. *Ld. Raym.* 1442. *S. C. Stra.* 734.

and

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and the caſe of a *peer* that had ſat in the houſe. For if his lordſhip had ever been ſummoned to parliament, and had a writ to ſhew, and there was no diſpute about the identity of the perſon, it would have been reaſonable to have granted a *ſuperſedeas*. But in this caſe, of a lord that has never ſat there, they could not do it, for they could not try *peerage* on a motion; but his lordſhip might plead it, and pray a *ſuperſedeas*. And *per Powel*, if in the writ he had been named *peer*, it would have been ſuperſeded. *Vide* 1 *Vent.* 298. *Ld. Raym.* 1247. *Salk.* 512.

Of

Of Proceeding by and againſt CORPORATIONS.

CORPORATIONS aggregate muſt ſue and be ſued *by attorney*, and therefore the proper proceſs againſt them is a *diſtringas*. *Co. Lit.* 66.

A *corporation* cannot be *eſſoigned*. *Dalt.* 121. *pl.* 154.

Nor *outlawed*. 10 *Co.* 32. *b.*

No *attachment* lies againſt a *corporation*.

A *corporation* cannot be declared againſt as in the cuſtody of the *marſhal*. 6 *Mod.* 183.

A *corporation* cannot ſue as a *common informer*. 2 *Stra.* 1241.

As *outlawry* does not lie againſt an aggregate corporation, therefore *treſpaſs* does not lie againſt them; for a *capias* and *exigent* do not go. *Bro. Corp.* 43.

Corporations aggregate cannot diſtrain in their own perſons, but by their bailiff, therefore *replevin* does not lie againſt them by the name of their corporation. *Brownl.* 175.

Corporations cannot ſue without their head, or in time of vacation of their headſhip. *Wood's Inſtit.* 110.

And if *mayor and commonalty* bring an action, and the *mayor* dies, the writ abates. *Salk.* 398.

Corporations aggregate cannot commit treaſon, or be outlawed or excommunicated. 10 *Rep.* 32. 1 *Rep.* 127. 1 *Inſt.* 134. *a.* or be executors or adminiſtrators. *Ibid.* Though 1 *Roll. Abr.* 915. *contra*, but *quære?* for they cannot take an oath.

They cannot be joint tenants to take by ſurvivorſhips, but they may be tenants in common. *Wood's Inſtit.* 110.

They cannot be ſeiſed to the uſe of another. *Ibid.*

The members cannot regularly be witneſſes for the corporation, eſpecially if they teſtify for any conſiderable advantage or profit of the body. 2 *Lev.* 232. 236. 2 *Str.* 1069. For every member hath a right and freehold for his life as to his freedom, and all the members together have an inheritance in the lands, and an intereſt in the goods.

If a *corporation* ſue, they muſt ſue in the name of the corporation, by an attorney appointed under the ſeal of the corporation.

Corporations *aggregate* cannot be bound without deed, therefore no action lies againſt them, unleſs founded on a deed. But an action will lie againſt a corporation ſole upon a promiſe; and if corporations aggregate have made a promiſe, the party's remedy for non-performance, is by bill in equity,

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equity, to compel a ſpecifick performance, as to make a new leaſe, &c.

And if a corporation is ſued, it muſt be ſued by its name of *incorporation* by *original writ*—and in order to ſue a corporation, the plaintiff's attorney muſt make out a *præcipe* for an *original writ*, which *original writ* muſt be made out by the *curſitor* of the proper county, and duly filed with the *filazer* in *B. R.* or *cuſtos brevium* in *C. B.* on which a *ſummons* muſt be made out, containing the whole cauſe of action, for the ſheriff to ſummon them; upon which, if they appear, the proceedings are the ſame as in other caſes; but their appearance muſt be by an attorney appointed under the *common ſeal*, and not in their own perſons. *Bro. Corp.* 28.

If they do not appear upon the ſummons at the return of the *original writ*, the plaintiff muſt take out a *diſtringas*, and proceed againſt them by *diſtreſs infinite*; and it is not ſufficient if the particular perſons diſtrained upon appear at the return of the proceſs. *Bro. Corp.* 28. or if all the members of the corporation appear in perſon; but they muſt appear by an attorney appointed under ſeal.

Should the ſheriff return but ſmall *iſſues* on the *diſtringas*, the court, on motion, will order him to return greater.

In an action againſt the *Eaſt-India Company* for 5000 *l.* it was moved, that the ſheriff might return exemplary iſſues, becauſe ſeveral writs of *diſtringas* had been already ſerved to no purpoſe; and the court ſaid, he ſhould return good iſſues; and if he did not, the plaintiff might bring an action againſt him; but at laſt he was ordered to attend. *Salk.* 191. *pl.* 2.

Defendants (the bailiffs and burgeſſes of *Eaſt Retford*) were ſued in their corporate capacity, by common *capias ad reſpondendum*; and upon affidavit of ſervice, an appearance was entered by plaintiff, *according to the ſtatute*; and plaintiff entered a declaration in the office, reciting, that defendants were attached to anſwer (which cannot be). Defendants moved to ſet aſide the *capias* and proceedings thereon; objecting, they ought to be ſued by *pone* and *diſtringas*. And the court were of opinion, that as defendants are ſued in a corporate capacity, the *capias ad reſp.* is null and void: and the rule to ſhew cauſe was made abſolute. It was agreed, that had the defendants themſelves appeared, the objection had been waived. *Langley* v. *the bailiffs and burgeſſes of Eaſt Retford.* *Barnes*, 415.

Of Proceeding by and against CORPORATIONS.

Special original ſued out in *Lincolnſhire*, and defendants appeared. Plaintiff declared in *Middleſex*, defendants appeared; refuſing to accept the declaration, it was left in the *prothonotary's* office, and taken out and paid for by defendants agent. Plaintiff ſued out a new original in *Middleſex*. The court held, the taking the declaration out of the office to be a waiver of the former proceedings; and diſcharged the rule to ſhew cauſe why proceedings in *Middleſex* ſhould not be ſtayed.—*Note*, An eſſoign had been caſt, and adjourned before defendants appearance; but the court did not hold that material. *Marquand v. the mayor and burgeſſes of Boſton in Lincolnſhire. Barnes*, 416.

Of Proceeding againſt HUNDREDORS.

IF an action be commenced againſt *hundredors*, the ſuit in *B. R.* as well as in *C. B.* muſt be *by original* [that is, if the *hundred* generally are to be ſued; but if the ſuit be againſt ſome of the inhabitants of the hundred in the name of the reſt, the ſuit may be by bill in *B. R.*], for the inhabitants of an hundred cannot be in the cuſtody of the *marſhal*. 3 *Keb.* 126. 2 *Saund.* 375. 4 *Mod.* 296.

To proceed againſt an hundred on the ſtatute of *hue and cry*, 13 *Ed.* 1. the plaintiff muſt take out his *original writ*, which muſt be teſted *forty days* after the robbery [which forty days are allowed for the hundred to take the thieves by the ſtatute of *Winton*. *R.* 3 *Lev.* 320.], and within a year after the robbery. *R.* 1 *Brownl.* 156.

The *original writ* uſually recites the ſtatute. *Th. Br.* 141. 2 *Saund.* 374. 4 *Mod.* 296. 1 *Bro. Ent.* 99. But the recital of the ſtatute is not neceſſary; though it muſt ſtate the circumſtances of the robbery, and the plaintiff's compliance with the *ſtatutes* *, *viz. that he made hue and cry, gave notice of the robbery, deſcribed the felons, the time and place of the robbery; that within twenty days he cauſed notice thereof to be given in the* London Gazette, *deſcribed the robbers and robbery therein; that he entered into bond before the ſheriff to the high conſtable of the hundred, with condition for the ſecurity of the coſts in caſe of being nonſuited, diſcontinuing, &c. that twenty days before the iſſuing of the writ, he made oath before a juſtice, that he did not know the parties who robbed him, and that the inhabitants of the hundred have not taken the robbers*, &c.

The proceſs ſerved is a copy of the *original writ*, which proceſs formerly uſed to be ſerved on ſome inhabitant of the hundred. But by the 8 *Geo.* 2. *c.* 16. it is enacted, "That no proceſs for appearance in any action to be brought upon the ſtatutes of hue and cry, or either of them, againſt any hundred, ſhall be ſerved on any inhabitant thereof, ſave only upon the high conſtable, or high conſtables, of the hundred wherein the robbery ſhall happen; who is required to cauſe publick notice thereof to be given in one of the principal market-towns within ſuch hundred, on the next market-day after he or they ſhall be ſerved with ſuch proceſs; or, if there ſhall

* The ſtatute of *Winchester*, 13 *Edw.* 1. *ſt.* 1. is explained and enforced by ſeveral ſubſequent ſtatutes, *viz.* 27 *El. c.* 13. 29 *Car.* 2. *c.* 7. 8 *Geo.* 2. *c.* 16. 22 *Geo.* 2. *c.* 24.

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happen to be no market-town within the hundred, then in ſome pariſh-church within the ſame hundred, immediately after divine ſervice, on the *Sunday* next after his or their being ſerved with ſuch proceſs; and he or they is and are hereby impowered and required to enter, or cauſe to be entered, an appearance in the ſaid action, and alſo defend the ſame for and on behalf of the inhabitants of the ſaid hundred, as he or they ſhall be adviſed."

The declaration muſt be againſt the inhabitants of the hundred generally; for if it is againſt any by name, and all are not named, it will be bad. *R. 2 Keb.* 126.

The declaration need not recite the original at large, *Rq.* 1654. *Mills*, 26. nor more of the ſtatute than is pertinent to the action, 2 *Ventr.* 215. and muſt conclude *contra formam ſtatuti. i. e.* the ſtatute of *Winton*, for *contra formam ſtatutorum* is bad. *Yelv.* 116.

If the defendants plead, and there is an iſſue, the *venire facias* ſhall be awarded to the next hundred. *Theſ. Brev.* 144, *quer.* for ſince the 24 *Geo.* 2. *c.* 18. *ſ.* 3. it ſeems the *venire* ſhould be awarded *de corpore comitatus*, except the hundred againſt which the action is brought.

If judgment be given againſt *the hundred*, the ſheriff, *&c.* upon receipt of any writ of execution againſt any inhabitant, inſtead of ſerving the ſame, ſhall cauſe the ſame to be ſhewn *gratis* to two juſtices of the county, riding, or diviſion [whereof one to be of the *quorum*], who are to cauſe ſuch taxation and aſſeſſment to be made, and to be levied, according to the 27 *Eliz. viz.* by the conſtables, *&c.* rateably and proportionably, *&c.* in which taxation and aſſeſſment there ſhall be provided and included, over and above what the coſts and damages recovered by the plaintiff in ſuch action ſhall amount to, all ſuch juſt and neceſſary expences, which the high conſtable of the hundred hath been at in defending ſuch action, claim being made thereto by ſuch high conſtable, before the ſaid juſtices, upon due notice for that purpoſe given him; and the money, ſo to be levied, to be paid over by ſuch conſtable, *&c.* within ten days after collection, to the ſheriff of the county, to the uſe of the plaintiff in ſuch action, for ſo much as his coſts and damages recovered ſhall amount unto, and to the uſe of the ſaid high conſtable, for ſo much as his expences in defending the ſaid action ſhall amount to; of which he ſhall give an account, and make proof thereof upon oath, to the ſatisfaction of the ſaid juſtices, before any taxation ſhall be made for reimburſing

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burſing ſuch high conſtable; and ſhall, in ſuch expences, have no further allowance, toward paying an attorney to defend the ſaid action, than what ſuch attorney's bill ſhall be taxed at by the proper officer of that court where the action ſhall be brought, which the ſaid high conſtable ſhall cauſe to be taxed for that purpoſe. *Stat.* 8 *Geo.* 2. *c.* 16. *ſ.* 4.

The *7th ſect.* of the above act provides in what manner the conſtable ſhall be reimburſed his expences in caſe the plaintiff is nonſuited, *&c.* and becomes, or his ſureties in the bond become, *inſolvent*.

Of the Action of EJECTMENT.

THE action of *ejectment* is a mixed action, in which a *leſſee* for years ſhall recover his term, and alſo his damages. 5 *Co.* 105. 9 *Co.* 77. and is almoſt the only remedy in practice for recovering land wrongfully withheld. *Burr.* 4 *pt.* 667. For it is *real* in reſpect of the *lands*, and *perſonal* in reſpect of the *damages* and *coſts*. Per *Holt*, ch. j. *Comb.* 250.

Real actions required ſo much nicety, and were attended, in old times, with ſo much trouble and expence, that the remedy by *ejectment* was contrived to ſupply ſeveral defects which attended the bringing them; for in *real actions* the demandant could not recover any *damages*, only his poſſeſſion; and if he was barred in one action, he could not regularly bring another. 6 *Co.* 7. *Ferrar's* caſe.

The concluding a man by one action being often found ſo prejudicial to his right, that the manner of forming a term for years, and the leſſee's bringing an ejectment to recover his *term*, and thereby to aſſert the title of his leſſor, was found out, and was firſt introduced in the 14 *Hen.* 7.* [before which time the plaintiff in *ejectment* only recovered *damages* for the turning him out of poſſeſſion, and did not recover his term in the premiſſes]; for, till about that time, leaſes for years were but of a very ſhort duration, and were generally defeated or determined before any intricate title could be decided; and were ſuch precarious poſſeſſions, with reſpect to the power that the owner of the freehold or inheritance had over them, that every ſuch leſſee was looked upon only as his bailiff or ſteward; and therefore, if ouſted by a ſtranger, could only have recovered *damages* for the loſs of his poſſeſſion; or if turned out by his leſſor, could only ſeek remedy from his *covenants*.

But as, about this time of *Henry* 7. leaſes for long terms began to creep into uſe, the leſſees whereof, when moleſted, uſed to go, in order to ſecure themſelves, into equity, againſt their leſſors, for a ſpecifick performance; and againſt ſtrangers, to have perpetual injunctions to quiet their poſſeſſions, which, as it drew conſiderable buſineſs into the courts of equity, was probably one reaſon which induced the courts of law to come to a reſolution to give judgment, that the *leſſee in ejectment ſhould recover poſſeſſion of the land itſelf, by the proceſs of an habere facias poſſeſſionem*; ſo that the object of the action became entirely changed; for, as the plaintiff recovered the *term* itſelf, he had nominal damages only for the *ouſter*, but not the *meſne*

* *F. N. B.* 506.

profits;

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profits; whereas, by the old writ of ejectment, he recovered nothing but *damages* for the ouſter, the meaſure whereof were the *meſne profits* of the eſtate accruing to the ejector ſince the time of the ouſter.

The above reſolution of the courts brought on a new method of trial, unknown to the *common law*. For now it became uſual for a man that had a right of entry into any lands to enter thereon and ſeal leaſes; and then the perſon that next came on the freehold, *animo poſſidendi*, was accounted an ejector of the leſſee; by which means any man might be turned out of poſſeſſion; becauſe the leſſee in ejectment would recover his term without any notice to the tenant in poſſeſſion; ſo that the courts of law, to remedy this inconvenience and injuſtice, made it a ſtanding rule, that no plaintiff ſhould proceed in ejectment to recover his lands againſt ſuch a feigned ejector, without delivering the tenant in poſſeſſion a declaration, and making him an ejector and proper defendant if he pleaſed.

This rule of court became abſolutely neceſſary upon the alteration of the object of the action of ejectment, which was now *in rem*; for otherwiſe, the court would have been inſtrumental in doing an injury to a third perſon; becauſe a declaration might otherwiſe be delivered to a ſtranger, a feigned defence be made, and a verdict, judgment, and execution thereon obtained, whereby the tenant would have been ouſted, without notice of any proceedings againſt him.

Upon this notice to the tenant in poſſeſſion, and *affidavit* thereof made, it was uſual for the tenant in poſſeſſion to move the court, that, as the title of the land belonged to him, he might defend the ſuit in the caſual ejector's name; which the court, upon an *affidavit* of that matter, uſed to grant; and that the ſuit ſhould be carried on in the caſual ejector's name, the tenant in poſſeſſion ſaving him harmleſs; and then the caſual ejector was not permitted to releaſe errors in prejudice of the tenant in poſſeſſion, ſince the ſuit was carried on in his name by rule of court; and the proceſs for coſts was taken out againſt the caſual ejector, who was obliged to reſort to the tenant in poſſeſſion to recover back the ſame, and put his bond of indemnification in ſuit upon his refuſal to pay them. *Styl.* 468. 1 *Keb.* 705. 740.

Alſo ſuch leaſes were actually to be ſealed and delivered, otherwiſe the plaintiff could maintain no title to the term, and were alſo obliged to be ſealed on the land itſelf, otherwiſe it

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amounted to *maintenance* by the old law, to convey a title to any one, when the grantor himſelf was not in poſſeſſion.

But at this day there is regularly no neceſſity of ſealing and delivering leaſes on the lands, where there is an actual tenant or occupier of the lands, a much more expeditious and eaſy method of proceeding in ejectment having been invented by lord chief juſtice *Rolle* [who ſat in the *upper* bench, ſo called, during the exile of king *Charles* the Second], and followed ever ſince by the courts.

I have ſaid thus much of the action of *ejectment*, and the old method of proceeding therein, that the practiſer and ſtudent may the better underſtand the *modern practice* relating thereto, and the reaſons on which it is founded.

The new method of proceeding in *ejectment* entirely depends on a ſtring of legal fictions; no actual *leaſe* is made, no actual *entry* by the plaintiff, no actual *ouſter* by the defendant, but all are merely ideal, for the ſole purpoſe of trying the *title*. To this end, in the proceedings, a leaſe for a term of years is ſtated to have been made by him who claims title, to the *plaintiff*, who is generally an ideal fictitious perſon who has no exiſtence, though it ought to be a real perſon. In this proceeding, which is the *declaration*, for there is no other proceſs in this action, it is alſo ſtated, that the *leſſee*, in conſequence of the demiſe to him made, entered into the premiſſes; and that the *defendant*, who is alſo now another ideal fictitious perſon, and who is called the *caſual ejector*, afterwards entered thereon, and ouſted the *plaintiff*; for which ouſter the *plaintiff* brings this action. Under this *declaration* is written a notice, ſuppoſed to be written by this *caſual ejector*, directed to the *tenant in poſſeſſion of the premiſſes*; in which notice the *caſual ejector* informs the *tenant* of the action brought by the *leſſee*, and aſſures him, that as he, the *caſual ejector*, has no title at all to the premiſſes, he ſhall make no defence; and therefore he adviſes the *tenant* to appear in court at a certain time, and defend his own title, otherwiſe he, the *caſual ejector*, will ſuffer judgment to be had againſt him, by which the *actual tenant* will inevitably be turned out of poſſeſſion.

The declaration is then ſerved on the *tenant* in poſſeſſion, with this friendly caution annexed to it, who has then an opportunity of defending his title; which if he omits to do in a limited time, he is ſuppoſed to have no right at all; and, upon judgment being had againſt the *caſual ejector*, the *real tenant* will be turned out of poſſeſſion by the ſheriff.

But

Of the Action of EJECTMENT.

But if the *tenant* applies to be made a defendant, it is allowed him upon this condition, that he enter into a *rule* of court to confeſs at the trial of the cauſe *three* of the four requiſites for the maintenance of the plaintiff's action, *viz.* the *leaſe* of the leſſor, the *entry* of the plaintiff, and the *ouſter* by the *tenant* himſelf, who is now made *defendant* inſtead of the *caſual ejector*; which requiſites, as they are wholly fictitious, ſhould the defendant put the plaintiff to prove, he muſt of courſe be *non-ſuited* at the trial for want of evidence; but by ſuch ſtipulated confeſſion of *leaſe, entry and ouſter*, the trial will ſtand upon the merits of the *title* only.

Upon this rule being entered into, the *declaration* is now altered by inſerting the name of the *tenant* inſtead of the fictitious name of the *caſual ejector*; and the cauſe goes to trial under the name of the *fictitious leſſee* on the demiſe of *A. B.* (the leſſor or perſon claiming title) againſt *C. D.* (the now defendant), and therein the leſſor is bound to make out his *title* to the premiſſes, otherwiſe his nominal leſſee cannot obtain judgment to have poſſeſſion of the land for the term ſuppoſed to be granted. But if he makes out his *title* in a ſatisfactory manner, the judgment is given for the *nominal plaintiff*, and a writ of poſſeſſion goes in his name to the ſheriff to deliver poſſeſſion. But if the *now defendant* fails to appear at the trial, and to confeſs *leaſe, entry and ouſter*, the *nominal plaintiff* muſt indeed be there nonſuited for want of proving theſe requiſites; but judgment will nevertheleſs, in the end, be entered for him againſt the *caſual ejector*; for the condition on which the *tenant* was admitted defendant is broken, and therefore the *plaintiff* is put again in the ſame ſituation as if he never had appeared at all; the conſequence of which we have ſeen would have been, that judgment muſt paſs for the *plaintiff*, and the *tenant* would have been turned out of poſſeſſion. The ſame proceſs, therefore, as would have been had, provided no conditional rule had been made, muſt now be purſued as ſoon as the condition is broken; but execution will be ſtayed, if any landlord, after the default of his *tenant*, applies to be made a defendant, and enters into the uſual rule to confeſs *leaſe, entry and ouſter*.

Of recovering the *meſne profits* of the *tenant*, after the plaintiff has recovered poſſeſſion by the action of *ejectment*, vide *poſt*.

The confeſſion of *leaſe, entry and ouſter*, is ſufficient in all caſes, except in caſe of a *fine* with proclamations, in which caſe it is neceſſary to prove an *actual entry*; and the leſſor of plaintiff directing one to deliver a declaration in ejectment to the tenant in poſſeſſion, will not amount to ſuch an entry.

And

Of the Action of EJECTMENT.

And by 4 & 5 *Anne, cap.* 16. *ſ.* 16. no claim or entry ſhall be of force to avoid a *fine levied with proclamations*, or ſhall be ſufficient within the ſtat. 21 *Ja.* 1. of limitations, unleſs the action be commenced *within one year* after making ſuch entry or claim.—And the plaintiff muſt not lay his demiſe antecedent to his entry. *Stra.* 1086.

By the 4 *of Hen.* 7. *c.* 24. Not only all parties and privies to a *fine*, and their heirs; but all ſtrangers whatſoever, are bound by a *fine* duly levied and paſſed, after *five years* after proclamations made are paſſed, except *feme coverts, infants, priſoners, perſons beyond ſea, and ſuch as are not of whole mind*, who have *five years* allowed to them, after the death of their huſbands, their attaining full age, recovering their liberty, returning to *England*, or being reſtored to their right mind.

If *A.* enter on the premiſſes in *B.*'s name, but without any authority or command from *B.* yet if *B.* afterwards, and before the time when the demiſe is laid to be made, conſents to *A.*'s entry, ſuch ſubſequent conſent is ſufficient. *Stra.* 1128.

By the 21 *of Ja.* 1. *c.* 16. Ejectment muſt be brought *within twenty years* after the title or right of entry accrued. Therefore if the leſſor of plaintiff be not able to prove himſelf or his anceſtors to have been in poſſeſſion within twenty years before action brought, he ſhall be *nonſuited.*—And if a declaration in ejectment be delivered *within twenty years*, and a trial had, whereby there is *leaſe, entry and ouſter* confeſſed, yet if the plaintiff, being nonſuited in that action, bring another *after twenty years*, that will not be proof of an entry to bring it out of the ſtatute; for it muſt be an actual entry. *Caſ. K. B.* 573. *Burr.* 2604.

For

For what an EJECTMENT lies.

THE action of *ejectment* lies in *B. R.* by *bill*, and by *original*; but in *C. B.* by *original* only.

As declarations in *ejectment* are generally made out by the attornies themſelves, who may buy common forms of declarations in *ejectment*, with blanks, of the law ſtationers: it will be neceſſary to ſhew for what an *ejectment* may be maintained.

It lies of a manor, meſſuage, ſo many acres of land, of meadow, of paſture, of wood, &c. 11 *Co.* 55.

Of a houſe. *Cro. Jac.* 654. *Noy*, 37. 3 *Lev.* 97. *Palm.* 337. *Hard.* 76.

Of a chamber in the ſecond ſtory of ſuch a houſe. 3 *Leon.* 210. *Noy*, 109. *Hard.* 57. Of part of a houſe. *Stra.* 695.

Of a certain place called the veſtry in *D.* 3 *Lev.* 96.

Of a rectory; of a chapel. *Latch.* 62. and may be demanded by the name of a meſſuage. *Salk.* 256. *Styl.* 101.

Of a cottage. 1 *Lev.* 58. *Cro. El.* 818. Of a ſtable. 1 *Lev.* 58.

Of a college, and of an orchard. *Noy*, 37. *Cro. El.* 118. 854. 1 *Rol. Rep.* 55. *Cro. Jac.* 655. *Palm.* 337. *Hard.* 55. 57. *Cro. Car.* 555.

Of a garden. 1 *Lev.* 58. *Godb.* 6.

Of a boilery of ſalt. 1 *Lev.* 114.

Of a coal-mine. *Cro. Jac.* 150. *Noy*, 121. and in *Durham*, of mines of coals, though not ſaid how many. Affirmed in error; the precedents for coal mines being ſo in that county. *Carth.* 227. 4 *Mod.* 143. *Comb.* 201. 1 *Show.* 364. *Salk.* 255.

Of land, and a coal-mine in the ſame land. *Cro. Jac.* 21.

For a pool, or ſtanding water. *Yelv.* 143. 1 *Inſt.* 5. *Reg.* 227. And for a ſtream, or running water, 1 *Inſt.* 5. *ſed cont. Yelv.* 143. for it ought to be of ſo many acres of land covered with water.

For a beaſt-gate. *Stra.* 1084. *Andr.* 106.

For ſo many acres of herbage. *Hard.* 303. 401.

For a firſt mowing. *Cro. Car.* 362.

For a hop-yard. *Palm.* 337.

Of a cloſe, called *D.* containing three acres of land. *Cro. Jac.* 435. *Palm.* 102. 4 *Mod.* 98.

So for a parcel of a highway, and though it be built upon, it ſhall be demanded as land. *Bull. Ni. Pri.* 99.

For twenty acres of furze and heath. *Cro. Jac.* 179. 1 *Mod.* 90.

For fifty acres of furze and heath, and fifty acres of moor and marſh. *Burr.* 4 *pt.* 2672.

For what an EJECTMENT lies.

And ſaid *per Ld. Mansfield* in this caſe, that it has been determined, over and over, that ſuch exact and preciſe certainty is not requiſite in ejectment, as in *præcipe's*. A *præcipe* in a real action requires exactneſs and preciſion: but an ejectment is a fictitious action, contrived for eaſe, diſpatch, and ſaving expence; and has of late times been taken with more latitude than formerly.

For an alder car in *Norfolk*. *Str.* 1063.

For ten acres of wood, and ten acres of underwood. 2 *Rol. Rep.* 482.

For common of paſture. *Stra.* 71.

For the paſture of one hundred ſheep. *Hard.* 52. *Dalis*, 95.

For four mills, without ſpecifying wood or water mills, for ten acres of ———. *Cro. El.* 339.

For a piece of land called *B.* or a cloſe of land called *B.* *Cro. Jac.* 435. 3 *Lev.* 97.

For a meſſuage or burgage, for they are ſynonymous in a borough. *R. Hard.* 173.

For a meſſuage *or tenement* called the *Black Swan*. 3 *Mod.* 238. 1 *Sid.* 295. becauſe certain enough for the ſheriff to deliver poſſeſſion.

So an ejectment lies for *tythes*; for although tythes are eſteemed part of the incorporeal inheritance, and by the common law were only of eccleſiaſtical conuſance, yet, being in the hands of lay proprietors, are now conſidered as a temporal eſtate; for, by 32 *H.* 8. *c.* 7. it is provided, that every lay perſon * having any eſtate of inheritance, freehold, right, term, or intereſt, in tythes; and being thereof deſſeiſed, ouſted, wronged, or otherwiſe kept from the ſame, ſhall have his remedy in the courts of law, for them, in like manner as for lands; and hence it is, that an ejectment lies for *tythes*. Vide *Cro. Car.* 301. *Jones*, 321. *Ld. Raym.* 789.

An ejectment lies for *a rectory*, becauſe a rectory conſiſts of a church, glebe lands and tythes. *Latch.* 62.

It was formerly held, that ejectment did not lie for a *chapel*, becauſe it was *res ſacra*, which was not demiſeable; but now, ſince they are become lay-inheritances, they are recoverable in ejectment, as other lay eſtates; but it muſt be demanded by the name of a meſſuage, or it is not formal. 11 *Co.* 25. *Style*,

* This remedy by the ſtatute is given only to *lay impropriators*; therefore the act of parliament leaves *ſpiritual perſons* to purſue their old remedy in the ſpiritual court. *Co. Lit.* 159. *Dyer*, 116. *pl.* 71.

For what an EJECTMENT lies.

101. *Doct. Plac.* 191. *Salk.* 256. *pl.* 7. But see 2 *Stra.* 914. 2 *Barnard, K. B.* 27. which seems *contra.*

Ejectment lies for a prebendal stall after collation to it. 1 *Wilf.* 14.

But an ejectment does not lie for a *tenement.* 2 *Stra.* 834. *Barnard, K. B.* 155. being too indefinite a term.

Nor for *pannage*, because this is no more than the fruit which falls from trees, which the swine have a right to feed on, and is not a part of the soil, as the herbage is. *Lev.* 212. *Sid.* 416. *S. C.* adjudged.

Nor for a rent or common appendant. *Cro. Car.* 292. *Cro. Jac.* 146. 1 *Inst.* 9. *a. sed vide Stra.* 71.

Nor of a fishery in such a river. *Cro. Car.* 492. *Cro. Jac.* 146.

Nor of a croft. *Style*, 30. But see 1 *Lev.* 58.

Nor of a *kitchen. Noy*, 409. Nor of a close, without specifying it. *Godb.* 53. 11 *R.* 55. *Bridg.* 56. 1 *Roll. Rep.* 55.

Nor of arable or pasture land, without shewing how much of one, or how much of the other. *Bridg.* 56. *Hard.* 133. *Palm.* 102. 3 *Lev.* 97. *Salk.* 254.

Nor for a rod of land. *Cro. El.* 339.

Nor of the fourth part of a meadow, without shewing how many acres the meadow contains. 1 *Lev.* 213.

An ejectment for a messuage or tenement, without other description, bad for incertainty. *Cro. El.* 186. 3 *Leon.* 228. *Pop.* 197. 203. *Noy*, 86. *Cro. Jac.* 125. *Style*, 364. 1 *Sid.* 295. *Cro. El.* 116. *March*, 96. 2 *Roll. Abr.* 80.

So an ejectment for 100 acres of waste, or for an hundred acres of mountain, is bad for incertainty. *Palm.* 100. *Hard.* 57. *Salk.* 255. 1 *Show.* 338.

In ejectment for an *entirety*, a *moiety* may be recovered.

Ejectment for five closes of land, arable and pasture, called *long furlongs*, containing ten acres, held ill; for the plaintiff ought to have shewn how many acres of arable land, and how many acres of pasture, distinctly, so as the sheriff might certainly know what to deliver upon the *habere facias possessionem. Carth.* 204. *Cro. Car.* 573. 471. *Hard.* 59. *Salk.* 254. 1 *Show.* 338. 4 *Mod.* 42. 97. *Comb.* 198.

Ejectment for a house, ten acres of land, and twenty acres of meadow by the name of a house, and ten acres of meadow. Verdict for plaintiff, but judgment arrested for repugnancy and incertainty. *Yelv.* 166. 4 *Noy*, 143.

Ejectment for a manor should describe the quantity and species of land contained therein. *Hetl.* 146. *Latch.* 61. *Lit. Rep.* 301.

So

For what an EJECTMENT lies.

So an ejectment for all and all manner of tythes in *D.* without saying or giving any other description of the nature and quality of the tythes, held naught. 11 *Rep.* 25. *Moor.* 837. *pl.* 1130. 1 *Roll. Rep.* 68. *Palm.* 101. *Andr.* 107.

Ejectment does not lie where no certainty appears, whereof the sheriff can deliver possession. *Mar.* 96.

But it seems sufficient if so much certainty appears, upon which the sheriff can deliver possession, as ejectment for a parcel of land called *B.* or a close called *B.* *Cro. Jac.* 435. 3 *Lev.* 97. or a *tenement* called the *Black Swan*, *&c.*

An ejectment does not lie for a rent, or other things that lie merely in grant, because these, being incorporeal things, are in their nature invisible, *quæ neque tangi nec videri possunt*; and therefore not in their nature capable of being delivered in execution. *Co. Lit.* 9. *a.*

But the grantee of a *rent charge*, with power to enter and detain, *quousque* he be satisfied, has such an estate that he may demise it to a plaintiff in ejectment. 1 *Saund.* 112.

So may tenant by *elegit*, but he must prove the judgment, the *elegit* taken out upon it, and the inquisition and return thereupon, by which the land in question is assigned to him; and if by that it appears, that more than a *moiety* was extended, he cannot recover; for it would be *ipso facto* void, and not need a judgment, or *audita querela*, to avoid it. *Salk.* 560. *Ld. Raym.* 718.

So the conusee of a *statute merchant* may bring ejectment; but then he must prove a copy of the statute, and of the *capias si laicus* returned, and the *extent* returned, and the *liberate* returned; for though by the return of the *extent*, an interest is vested in the *conusee*, yet the actual possession of the interest is by the *liberate*. *Salk.* 563. *Carth.* 245.

Though the method of *ejectment* is now universally adopted in almost every case, to try the title to lands and tenements, being founded on the same principle as the ancient writs of *assize*, yet an ejectment is not an adequate means to try the title of all estates; for on those things, whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore it is, that an *ejectment* will not lie of an advowson, a rent, a common, or other incorporeal hereditament; except for tythes in the hands of *lay appropriators*, by the express purview of the *stat.* 32 *Hen.* 8. *c.* 37. which doctrine hath since been extended, by analogy, to tythes in the hands of the clergy. *Cro. Car.* 301. *Ld. Raym.* 789. nor will it lie in such cases, where the entry of him that hath right is taken away by *descent*, *discontinuance*, *twenty years dispossession*, *or otherwise*.

Of

Of the Demiſe in EJECTMENT.

THE declaration in ejectment muſt ſhew a good demiſe. *Yelv.* 166.

And if it is of *tythes*, it ought to ſay, that the leſſor demiſed by deed. *Cro. Jac.* 613.

Alſo the leſſor of the plaintiff muſt have a right of entry when this action is brought. And by the ſtatute of limitations, 21 *Jac.* 1. c. 16. none ſhall make an entry into lands, but within twenty years after their right or title which ſhall firſt deſcend or accrue to them; but this act hath the uſual ſavings for *infants*, *feme coverts*, *&c.*

The *demiſe* in the declaration muſt be ſaid after the title accrues, otherwiſe the plaintiff will be nonſuited; and the plaintiff muſt lay the commencement of his ſuppoſed leaſe to have been precedent to the ejectment by the defendant. 1 *Sid.* 8.

If there be ſeveral leſſors, and it is laid in the declaration that *they demiſed*, you muſt ſhew ſuch a title in them, that they could demiſe the whole. *Cro. Jac.* 166.

The demiſe was laid on the *eſſoign day* of the term, plaintiff had a verdict; and in arreſt of judgment it was ſaid, that the eſſoign day is in law accounted the firſt day of term, and the demiſe being laid on that day, the ejectment was brought before plaintiff had a cauſe of action. But *per Cur.* the action and the wrong may be on one and the ſame day; and this being by original, may be ſued out after the commencement of the term, and returned; but admitting it to be a ſlip, the defendant ſhould have taken advantage of it on oyer. 3 *Salk.* 8.

In ejectment, on the demiſe of an *heir* by deſcent, the demiſe was laid on the day his anceſtor died, and held to be well enough. 3 *Wilſ.* 274.

If leſſors of plaintiff are *tenants in common*, there ought to be a different count on the demiſe of each *tenant in common*; or they may join in a leaſe [and if there are many it is the better way] to a third perſon; and that leſſee make a leaſe to try the title. For *tenants in common* cannot make a *joint leaſe*. 2 *Wilſ.* 232.

But *joint tenants* are ſeiſed *per my et per tout*, that is, each has an undivided moiety of the whole; and therefore each may be ſaid to demiſe the whole.

So of *coparceners*, for they ſtand on the ſame foundation. Vide *Bull, Ni. Pri.* 107.

If a man be ſeiſed of the whole, and makes a leaſe to another of a *moiety undivided*, and a ſtranger ouſts the leſſee, he muſt bring his ejectment of a *moiety*; and ſo if they be both ouſted, they muſt bring ſeveral ejectments. *Salk.* 423.

Where

Of the Demiſe in EJECTMENT.

Where a *corporation aggregate* is leſſor of the plaintiff, they muſt give a letter of attorney to ſome perſon to enter and ſeal a leaſe on the land; and therefore the plaintiff ought, in ſuch caſe, to declare upon *a demiſe by deed*; for they cannot enter and demiſe upon the land as natural perſons can, though this will be aided after verdict. *Carth.* 390.

But a demiſe of a corporation in ejectment was held to be good, without mentioning that it was *by deed*. *Ld. Raym.* 136.

If *truſtees* of a charity want to bring *ejectment*, it ſeems, that the *truſtees*, at the time of bringing the ejectment, ſhould be the leſſors of the plaintiff; but beſides the count on their demiſe, there ſhould be another on the demiſe of the leſſors *(truſtees)* in the leaſe; another on the demiſe of all the then truſtees, if more than were the leſſors in the leaſe; and another on the demiſe of the receiver of the charity.

If the leſſor of the plaintiff be an *infant*, the demiſe ſhould be ſtated to be *by deed*, and alſo rendering rent; though there is no occaſion in ſuch caſe for a real leaſe.

So upon the demiſe of a maſter and fellows of a college, dean and chapter of a cathedral, maſter or guardian of an hoſpital, parſon, vicar, or other eccleſiaſtical perſon, of any lands, *&c.* the declaration ſhould ſtate, that there was a rent reſerved, *&c.* purſuant to the ſtat. 13 *El. c.* 10. *R. Sav.* 129.

Demiſe was laid in 1697, inſtead of 1696,—97 not being come at the time of the trial; and it was holden to be not amendable after verdict, becauſe it would be another title; and the court will in no caſe (either before or after verdict) allow an amendment in the declaration, becauſe in ejectment it is in nature of proceſs. *Stra.* 1211.

Of

Of the Declaration in EJECTMENT.

THE form of a *declaration* in ejectment on a ſingle demiſe *by bill in B. R.* is as follows:

Hilary term, in the 20*th* year of king *George* the Third.

Stormont and *Way.*

Middleſex, to wit. *John Den* complains of *Richard Fen*, being in the cuſtody of the marſhal of the *Marſhalſea* of our ſovereign lord the king, before the king himſelf; for that *whereas William Smith, Eſquire*, on the fifth day of *January*, in the nineteenth year of the reign of our ſovereign lord *George*, the now king of *Great Britain*, &c. at *Weſtminſter*, in the county of *Middleſex*, had demiſed, granted, and to farm let to the ſaid *John Den*, *four meſſuages, four barns, four ſtables, fifty acres of land, fifty acres of arable land, fifty acres of paſture land, twenty acres of wood, and twenty acres of underwood* [ſo deſcribe the parcels according to the caſe], with the appurtenances, ſituate, lying, and being in the pariſh of Saint *Mary, Iſlington* [the vill or town where the premiſes lie], in the county aforeſaid, to have and to hold the ſaid premiſſes, with the appurtenances, from the ſaid fifth day of *January*, in the year aforeſaid, for and unto the full end and term of five years thence next enſuing, and fully to be complete and ended; by virtue of which ſaid demiſe, he the ſaid *John Den* entered into the ſaid premiſſes, with the appurtenances, and was poſſeſſed thereof, until the ſaid *Richard Fen* afterwards, to wit, on the tenth day of *January*, in the nineteenth year aforeſaid, with force and arms, &c. entered on the premiſſes aforeſaid, with the appurtenances, in the poſſeſſion of the ſaid *John Den*, and then and there ejected, drove out, and amoved the ſaid *John Den* from his ſaid farm, his ſaid term therein not being yet ended: and him the ſaid *John Den*, ſo ejected, drove out and amoved, hath kept out, and ſtill doth keep from his poſſeſſion thereof, and other injuries to him then and there did, againſt the peace of our ſaid lord the king, and to the damage of the ſaid *John Den* of ten pounds; and therefore he brings ſuit, &c.

J. B. attorney for the plaintiff.

——— for the defendant.

Pledges to proſecute, { *John Doe*, and *Richard Roe.*

Then ſubſcribe the notice, the form of which ſee hereafter.

Of the Declaration in Ejectment.

The form of a *declaration* on a ſingle demiſe by *original* is as follows:

Hilary Term, in the 20*th* year of the reign of king *George* the Third.

Middleſex. Richard Fen, late of the pariſh of St. *Mary*, *Iſlington*, yeoman, was attached to anſwer *John Den* of a plea, wherefore with force and arms he entered into four meſſuages, four barns, *&c.* with the appurtenances, in the pariſh of St. *Mary*, *Iſlington*, which *William Smith*, Eſq; demiſed to the ſaid *John Den* for a term which is not yet expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid *John*, and againſt the peace of our ſaid ſovereign lord the king. And *whereupon* the ſaid *John Den*, by *William Lyon*, his attorney, complains, that *whereas* the ſaid *William Smith*, on the *firſt day of March*, *in the nineteenth year of the reign* of our preſent ſovereign lord the king, at *Weſtminſter*, in the ſaid county of *Middleſex*, had demiſed to the ſaid *John Den* the ſaid tenements, with the appurtenances, to have and to hold to the ſaid *John Den*, and his aſſigns, the aforeſaid tenements, with the appurtenances, from the ſaid firſt day of *March*, in the year aforeſaid, unto the full end and term of five years thence next enſuing, and fully to be complete and ended: by virtue of which ſaid demiſe, the ſaid *John Den* entered into the ſaid tenements, with the appurtenances, and was poſſeſſed thereof; and the ſaid *John Den*, being ſo poſſeſſed thereof, he the ſaid *Richard Fen* afterwards, to wit, on the ſecond day of *March*, in the year aforeſaid, with force and arms, *&c.* entered into and upon the ſaid tenements, with the appurtenances, which the ſaid *William Smith* had demiſed to the ſaid *John Den* as aforeſaid, for the term aforeſaid, which is not yet expired, and ejected the ſaid *John Den* from his ſaid farm, and other wrongs to him then and there did, to the great damage of the ſaid *John Den*, and againſt the peace of our ſaid ſovereign lord the king; whereupon the ſaid *John Den* ſaith, that he is injured, and hath damage to the value of 20 *l.* and therefore he brings ſuit, *&c.*

For other forms of *declarations*, ſee the various books of *entries*.

The notice to be written under the declaration is in the following form:

Of the Declaration in EJECTMENT.

To Mr. *John Bull.*

I am informed, that you are in poſſeſſion, or claim title to the premiſſes in this declaration of ejectment mentioned, or to ſome part thereof; and I being ſued in this action as a caſual ejector, and having no claim or title to the ſame premiſſes, do adviſe you to appear on the firſt day of next *Eaſter term*, in his majeſty's court of *King's Bench* [or *Common Pleas*, as the caſe is] at *Weſtminſter*, by ſome attorney of that court; and then and there, by rule of the ſame court, to cauſe yourſelf to be made defendant in my ſtead, otherwiſe I ſhall ſuffer judgment to be entered againſt me, and you will be turned out of poſſeſſion.

Your loving friend,

The *1ſt* day of *February* 1780. *Richard Fen.*

The Engliſh notice at the foot of the declaration was ſubſcribed by the nominal plaintiff inſtead of the *caſual* ejector, which the court held bad, and diſcharged the rule for judgment. Same caſe in *B. R. Hil.* 2 *Geo.* 2. *Barnes*, 172.

The notice in ejectment was to appear on the *eſſoign day* of the term, and held ill; for it ſhould be to appear the firſt day in full term, which is the firſt day in term. *Stra.* 1049.

B. R.

If the premiſſes lie in *London* or *Middleſex*, make the notice to appear on the *firſt day of the next term* to that of which the declaration is entitled; otherwiſe, if made generally, the tenant will have the whole of the next term to appear in.

But if the premiſſes lie in any other county, the notice ſhould be to appear the next term generally.

C. B.

The ſame in this court.

The notice may be either for the beginning of the next term, or the next term generally.

As many copies of the *declaration* muſt be made out on treble penny ſtamped paper, as there are tenants in poſſeſſion of the premiſſes which the plaintiff claims; and each declaration muſt be perſonally ſerved on the tenant, or his wife, before the *eſſoign day* of the term wherein he is to appear, otherwiſe the plaintiff cannot have judgment till the term following. *Barnes*, 172. And the notice muſt be read over on the delivery, and fully explained.

Of the Declaration in EJECTMENT.

In ejectment, the demiſe in the declaration againſt the caſual ejector, and afterwards delivered to the tenant in poſſeſſion, was laid of the *ſecond of June*, to commence from *Lady-day* before: and after the tenant in poſſeſſion had entered into the common rule, in the declaration in the iſſue delivered to the defendant, the demiſe was laid to be of the *ſecond of Auguſt* following; the title of the leſſor of the plaintiff being upon a breach of a condition for nonpayment of rent due at *Midſummer*. And on motion that the iſſue might be made according to the declaration delivered to the tenant in poſſeſſion, becauſe plaintiff ought not to recover upon a title accrued ſubſequent to the delivery of the firſt declaration, *per tot Cur.* By the courſe of this court there can be no alteration in the declaration in the iſſue, from the firſt declaration delivered, only in the defendant's name. And a rule was made, that the iſſue ſhould be made according to the declaration delivered againſt the caſual ejector. *Baſs* v. *Bradford. B. R. Ld. Raym.* 1411.

Of the Delivery of the Declaration in EJECTMENT.

A Copy of the *declaration*, and notice thereon, muſt be delivered perſonally to the tenant or his wife, to whom, at the time of delivery, the notice ſhould be read over, or an account given of the contents and meaning thereof.

The ſervice may be on the tenant himſelf in any place off the premiſſes; but if it be on the wife or ſervant, it muſt be on the premiſſes; and if it be on the ſervant, there muſt be ſome acknowledgment by the tenant of having received it.

A delivery to his ſon, daughter, or ſervant, the tenant being abroad, or out of the way, is not a good delivery, unleſs it evidently appears to the court, that ſuch declaration and notice came to his hands before the eſſoign day of the term; and that on receipt thereof, he very well underſtood the contents and meaning of the notice; and in ſuch caſe it has been held a good delivery. *Salk.* 225. *pl.* 5.

The tenant in poſſeſſion acknowledged the receipt of a declaration in ejectment on a *Sunday*, which, before the *eſſoign day*, had been delivered to his daughter, and ſhe made acquainted of the contents. 2 *Barnes*, 148. But *q.* for a *declaration in ejectment* is in the nature of proceſs, and no proceſs ſhall be ſerved on a *Sunday*, by the ſtat. 29 *Car.* 2. *c.* 7. *ſ.* 6. Though the delivery of a *declaration*, in another action, on a *Sunday*, had been held good; but that is not proceſs.

Upon affidavit that they had tendered a declaration in ejectment, and that the ſervants refuſed to call their maſter, or receive it, ſaying, they had orders to take no papers; it was ordered, that leaving it at the houſe ſhould be ſufficient. *Stra.* 575.

The declaration was tendered to the tenant in poſſeſſion, who refuſed it; whereupon it was left on the floor in his preſence; and he entering into a parlour, and ſhutting the door, the perſon who ſo tendered and left the declaration, read the notice aloud, ſo that the tenant might hear it; and this was held good ſervice. *Barnes*, 185.

The tenant ſecreted himſelf in the houſe, ſo that he could not be perſonally ſerved; whereupon, on motion for a rule to ſhew cauſe why ſervice of it on the ſervant ſhould not be good, the court ordered the rule to be ſerved in that manner.

The wife of the tenant in poſſeſſion, on a perſon's knocking at the door of the houſe in order to ſerve the declaration, opened a wicket in the door, and looked through it, and was then acquainted with the contents of the declaration, and the *Engliſh* ſubſcription was read to her; and immediately after, and before the declaration could be tendered to her, ſhe ſhut the wicket;

Of the Delivery of the Declaration in EJECTMENT.

whereupon the declaration was fixed upon the door, as by affidavit appeared; and it was ſworn, that the tenant in poſſeſſion afterwards acknowledged the receipt of the declaration on the day it was tendered to his wife, and fixed upon the door; the ſervice was held inſufficient, becauſe the tenant's acknowledgment that he received the declaration is not enough. An actual delivery, or tender, and refuſal, ought either to be proved or confeſſed. *Barnes*, 171.

On motion for judgment, upon an affidavit, that tenant in poſſeſſion refuſed to accept the declaration when tendered to him; that he was acquainted with the contents; and that he brought a gun, and ſwore he would ſhoot the perſon who tendered the declaration, if he did not get off his land; whereupon the declaration was laid down on the ground in the preſence of defendant and his man, whom defendant ordered not to take it up; the court were of opinion, that theſe circumſtances amounted to good ſervice, and made a rule for judgment. *Per Cur.* It is the ſame thing as a continual claim, where the party comes as near the land as he can make his claim, for fear of his life. *Barnes*, 174.

The affidavit of ſervice of declaration was, that deponent did ſerve the wives of *A.* and *B.* who, or one of them, are tenants in poſſeſſion, *&c.* the court refuſed to make a rule for judgment; the affidavit is defective. *Ibid.*

Service of ejectment at the houſe may be made good by a ſubſequent rule of court. 1 *Blackſ. Rep.* 290.

Service of a declaration in ejectment on the wife of the tenant in poſſeſſion, is good ſervice. 2 *Blackſ. Rep.* 800.

On motion for judgment againſt the caſual ejector, upon an affidavit, that the declaration was tendered to the wife of the tenant in poſſeſſion, who refuſed to open the door of the houſe, but looked out of a parlour window, and was acquainted with the contents; and the ſubſcription was read to her, after which, ſhe refuſing to accept the declaration, it was put in at the window to her. The ſervice was held ſufficient. *Barnes*, 178.

The declaration was tendered to the wife of the tenant in poſſeſſion, upon the premiſſes; ſhe was acquainted with the contents thereof, and of the ſubſcription, through a window, which ſhe refuſed to open, or receive the declaration; and thereupon the declaration was left upon the outſide ledge of the window. The perſon who tendered the declaration ſwore, that he heard the woman's voice diſtinctly through the window, and was well

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well assured she heard what he said, by the answers she gave him; the service was held sufficient, and the common rule for judgment was made. *Barnes*, 180.

A declaration in ejectment served on the church-wardens and overseers of a parish, who rented a house for harbouring some of the parish poor, and did not otherwise occupy the house than by placing the poor in it, deemed sufficient service, and a rule made for judgment. *Barnes*, 181.

The declaration was left with the father of the tenant in possession, with the usual subscription, and he was acquainted with the contents; after which, and before the essoign day, the tenant acknowledged the receipt of it. Held sufficient. *Barnes*, 176.

Affidavit of service of declaration on the wife of tenant in possession, as she informed deponent, and as he verily believes; held sufficient. *Barnes*, 194.

The tenant secreting himself, so that he could not be served, the declaration was delivered to the daughter, who kept the house, and she made acquainted with the contents. A rule was made for the tenant to shew cause, why such former service should not be deemed good. The rule to be served on the daughter at the house. *Barnes*, 192.

On affidavit, that one of the tenants is a *lunatic*, and that one *C.* lives with her, transacts her business, and has the sole conduct thereof, and of her person, but would not permit the deponent to have access to her, in order to serve her with the declaration; whereupon he delivered it to the said *C.* and a rule was made for the lunatic and *C.* both to shew cause, why such service should not be good; and service of the rule on the said *C.* to be good. *Barnes*, 190.

On affidavit, that the tenant absconded to avoid being served, and that she came into the possession surreptitiously, and of service of the declaration on her son, who is her servant, manages her affairs, and lives in her family, a rule was made to shew cause, why such service should not be good, and leaving a copy of the rule at her house to be good service of the rule. *Barnes*, 190.

It appearing by affidavit, that one *G.* the tenant in possession, and his wife, had both absconded, and could not either of them be served with a delaration; and that they had left a woman servant in the house on the premisses, in whose presence a declaration was fixed up; the court made a rule on the tenant, to shew cause, why service of a declaration on his servant, at his

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houſe, ſhould not be deemed good ſervice, and directed the rule to be ſerved in that manner. *Barnes*, 188.

The tenant in poſſeſſion abſconded, and on affidavit thereof, the court ordered that ſervice of the declaration upon his niece, the only manager of the houſe, and reſident in it, and fixing up another copy on the premiſſes, ſhould be good; and made a rule to ſhew cauſe, why judgment ſhould not be entered up againſt the caſual ejector. And ordered that ſervice of this rule on *any* perſon in the houſe, and if no perſon there, then fixing the ſame on the door, ſhould be good ſervice thereof. *Burr. Rep.* 4 *pt.* 1116.

The tenant, an unmarried man, abſconded, leaving a ſervant in the houſe; to recover the poſſeſſion whereof, this ejectment was brought. Plaintiff moved for judgment upon an affidavit, that a copy of the declaration was ſerved upon the ſervant, and another copy was affixed on the ſtreet door; which the court held ſufficient ſervice, within the 4 *Geo.* 2. and made a rule accordingly. *Barnes*, 173.

The tenant was perſonated, at the time of the ſervice, by another who accepted the ſervice in the name of the tenant; and the court made a rule to ſhew cauſe, why it ſhould not be deemed good ſervice upon the tenant himſelf; and why judgment ſhould not be ſigned againſt the caſual ejector, in default of his appearing; and that leaving a copy of this rule at his houſe, with ſome perſon there, or if no one to be met with, affixing it on the door, ſhould be good ſervice thereof. Which rule was made abſolute on a proper affidavit. *Burr.* 4 *pt.* 1181.

When the tenant is ſerved with the declaration, a copy of the declaration muſt be made out on ſtamps, to annex to an *affidavit* of ſervice of the declaration on the tenant, in order to move for judgment on default of the tenant's appearance. Which *affidavit* muſt be to the following effect:

In the *King's Bench.*

John Den, on the demiſe of *William Smith*, plaintiff, againſt *Richard Fen*, defendant.

A. B. of, *&c.* gentleman, maketh oath, that he this deponent did, on the day of laſt paſt, deliver to Mr. *John Bull*, the tenant in poſſeſſion of the premiſſes in the declaration hereunto annexed mentioned, or of ſome part thereof,

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thereof, a true copy of the ſaid declaration, and of the notice thereunder written; and did at the ſame time inform him the ſaid *John Bull*, that it was a declaration in ejectment; and that unleſs he appeared by ſome attorney in this court, on the firſt day of this preſent *Eaſter* term, and cauſe himſelf, by rule of court, to be made defendant, in the room of the caſual ejector, *Richard Fen*, judgment would be entered againſt the caſual ejector by default; and that he the ſaid *John Bull* would thereupon be turned out of poſſeſſion, or words to that effect.

Sworn, *&c.* *A. B.*

This affidavit muſt be poſitive, that the tenant is tenant in poſſeſſion.

On motion againſt the caſual ejector, the affidavit ſet out, that deponent did ſerve *A. B.* tenant in poſſeſſion, or *C.* his wife, the court ſaid, it was not certain, as to either, and made no rule. *Barnes*, 173.

When ſeveral tenants have been ſerved with copies of the declaration, if it is meant but as one ejectment, and to be followed by one judgment; one affidavit of the ſervice of all is ſufficient, annexed to the copy of one declaration. But if the ejectments are made ſeveral, ſo as to have ſeparate judgments, writs of poſſeſſion, *&c.* then an affidavit muſt be annexed to ſeparate copies of the ejectment, of the ſervice ſeparately.

Of Judgment againſt the CASUAL EJECTOR.

ON an affidavit of ſervice and default of the tenant's appearance, you move for judgment againſt the *caſual ejector*; which affidavit is delivered over to the *clerk of the rules in B. R. or ſecondary in C. B.* when the motion is made to be filed; and then you draw up the *rule, with the clerk of the rules in B. R. or ſecondary in C. B.*

If the premiſſes lie in *London* or *Middleſex*, and the notice be to appear the firſt day of the next term, move for this rule the beginning of the term, and then the tenant has *four days* incluſive next after the motion to appear in *; but if the motion is made late in term, the court will not allow him more than one or two days; and will ſometimes order the tenant to appear immediately, ſo that the plaintiff may be able to give notice of trial within the term. But if the motion is not made before the four laſt days of the term, the tenant will then have, by the rule, until two days before the eſſoign day of the ſubſequent term, to appear. But if the notice be to appear generally, then the tenant hath the whole term to appear in. And if the tenements lie in any other county than *London* or *Middleſex*, though the declaration be delivered before the eſſoign day of *Eaſter* or *Michaelmas terms*, yet the tenant has till four days before the next iſſuable term, *i. e.* either *Trinity* or *Hilary*, to appear in. In *C. B.* till within *four days* excluſive, after the next iſſuable term. And if the premiſſes are in one of the northern counties, or where the aſſizes are held but once a year, the tenant has till *four days* next after the end of the term preceding the aſſizes, to appear.

The common practice of the court is, to receive motions for judgment againſt the *caſual ejector niſi*, *&c.* after the term is ended; and then, upon the common rule, the new defendant has no opportunity to plead to the juriſdiction, or to move for leave ſo to do.—But the court, on motion, will give leave to plead to the juriſdiction in ejectment. But *Q.* if the motion ought not to be, "*That the tenant in poſſeſſion, when made defendant, may have leave, &c.*" Vide 1 *Blackſ. Rep.* 197.

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* But in *C. B.* in ſuch caſe, by *Reg.* 32 *Car.* 2. "The plaintiff ſhall take nothing by his motion for judgment againſt the *caſual ejector*, for default of appearance, unleſs the motion be made within one week next after the firſt day of every *Michaelmas* term, and every *Eaſter* term; and within four days after the firſt day of every *Hilary* and *Trinity* term."

The

Of Judgment againſt the CASUAL EJECTOR.

The rule for judgment againſt the *caſual ejector* is drawn out in the following manner in the reſpective courts:

In B. R.

Saturday next after eight days of the Purification of the Bleſſed Virgin Mary, *in the twentieth year of the reign of king* George *the Third.*

Den on the demiſe of *Smith*, Eſq; againſt *Fen.* } Unleſs *John Bull*, the tenant in poſſeſſion of the premiſſes in queſtion, ſhall appear, and plead to iſſue on *Thurſday* next after the end of the term, let judgment be entered for the plaintiff, againſt the now defendant *Fen*, by default. And in the mean time proceedings to ſtay, upon the motion of Mr. *Bond.*

Let the rule be entered

By the court.

In C. B.

Hilary, the twentieth of king *George* the Third.

Den againſt *Fen*, the caſual ejector. } *Twelfth* day of *February*, upon the affidavit of *John Thomas*, gent. it is ordered, That unleſs *John Bull*, tenant in poſſeſſion of the tenements in queſtion, or any other perſon concerned in the title thereof, on *Saturday* next, ſhall appear by an attorney of this court, who ſhall then forthwith receive a declaration, and plead thereto the general iſſue, and conſent to the common rule for confeſſing leaſe, entry, and ouſter, upon the trial to be had; let judgment againſt the caſual ejector be entered, and in the mean time proceedings are to ſtay upon the motion of Mr. Sarjeant *Walker.*

By the court,

Fothergill.

By *Reg. Hil.* 2 *Geo.* 2. in *C. B.* No declaration in ejectment ſhall be taken or received by the *ſecondary*, unleſs ſigned by ſome ſerjeant at law, and delivered by himſelf to the ſecondary in open court.

And by the ſame rule, the ſecondary ſhall, the morning next after the end of every term, and at all other times when required, ſhew to any other perſon, who ſhall demand the ſame, his alphabetical paper of ejectments, moved or delivered into court in each term.

Of

Of appearing in EJECTMENT.

TO prevent fraudulent recoveries of the poſſeſſion, by colluſion with the tenant of the land, all tenants are obliged by the ſtatute 11 *Geo.* 2. *c.* 19. *ſ.* 12. to give notice to their landlords, of a declaration in ejectment being delivered, *under pain of forfeiting three years improved or rack rent of the premiſſes* ſo held and enjoyed by the tenant.

And as the tenant in poſſeſſion could not be compelled to appear and enter into the common rule, to become defendant inſtead of the caſual ejector; ſo neither could the landlord alone, without joining with the tenant, enter into ſuch rule, and be made ſole defendant. But to remedy this inconvenience, by ſect. 13. of the ſame ſtatute, it is enacted, "That it may "be lawful for the court where ſuch ejectment ſhall be "brought, to ſuffer the landlord to make himſelf defendant, "*by joining with the tenant*, in caſe he ſhould appear; but in "caſe ſuch tenant ſhall neglect or refuſe to appear, judg-"ment ſhall be ſigned againſt the *caſual ejector*, for want of "ſuch appearance: but if the landlord, *&c.* of any part of "the lands, *&c.* for which ſuch ejectment was brought, ſhall "deſire to appear by himſelf, and conſent to enter into the "like rule, that by the courſe of the court, the tenant in poſ-"ſeſſion, in caſe he or ſhe had appeared, ought to have done; "then the court, where ſuch ejectment ſhall be brought, ſhall "and may permit ſuch landlord ſo to do; and order a ſtay of "execution upon ſuch judgment, againſt the caſual ejector, "*until they ſhall make further order therein.*"

Under this act, no one but a *landlord* can be made a defendant, *Bull, Ni. Pri.* 95. that is, a perſon who is in ſome degree of poſſeſſion, as in receiving rent, or the like.

Therefore, where *I. S.* and *M.* his wife [who claimed title to part, of which *F.* and *G.* were tenants, and refuſed to appear], applied upon affidavit of the fact for leave to appear as to the ſaid part; and it appearing that the leſſors of plaintiff claimed title as *deviſees* under one will, and the ſaid *I. S.* and *M.* as deviſees under another will of the ſame teſtator, and the queſtion was, which ſhould prevail; the court ſaid, this motion is founded on the act 11 *Geo.* 2. and that they had no juriſdiction to admit any perſon to defend an ejectment, inſtead of the tenant, except the *landlord* only. And who is landlord within the act? not every perſon claiming title, but one who is in ſome degree of poſſeſſion, as receiving rent, *&c.* The clauſe of forfeiture by the tenant, if he does not give notice of the declaration to his landlord, proves this. *Roe ex dem. Leake* v. *Doe. Mich.* 29 *Geo.* 2. *C. B. Barnes*, 193.

In

Of appearing in EJECTMENT.

In like manner a mortgagee, who was not in poſſeſſion, and had never received the rents, was refuſed to be admitted a defendant with the tenant. *Jones ex dem. Woodward* v. *Williams*, *Tr.* 15 *Geo.* 2.

But a lord claiming by *eſcheat*, was admitted to defend. *Burr. Rep.* 4 *pt.* 1296.

Obſerve, this *ſtatute* 11 *Geo.* 2. provides, that the landlord may make himſelf a defendant in ejectment, when the tenant refuſes to appear. And though judgment is ſigned againſt the caſual ejector, the court ſhall order a ſtay of execution, *until they make further order therein.* Under this clauſe, the landlord appeared without the tenant, and after a verdict for plaintiff, he brought a writ of error, upon which plaintiff moved to take out execution, which the court refuſed to grant: for though it is left to their diſcretion, yet that can only be a legal one. The act intended to put the landlord in the place of the tenant, that he ſhould not be ſtripped by any act of the tenant; and it ought to be conſidered as if the tenant had brought error, which would undoubtedly be a *ſuperſedeas.* The court cannot take upon them to judge, whether there is error in the proceedings or not. *Jones* v. *Edwards. Stra.* 1241.

Like motion denied in *C. B. Barnes*, 208.

When the rule to plead is out, and no plea and rule left by the tenant, for which you muſt ſearch all the judges books in *B. R.* if the ejectment is *by bill*; and if by *original*, the *filazer*'s office [or if in *C. B.* the *prothonotary*'s plea-book]; you ingroſs your *declaration* on a double half-crown ſtamp; and on the roll draw up the rule againſt the caſual ejector, for judgment, and then carry the ſame to the *clerk of the judgments*, if in *B. R.* who, on producing the rule, will ſign the judgment, for which you pay 3*s.* 6*d.*; or if in *C. B.* it muſt be carried to the *prothonotary*, who will ſign the judgment; and then you enter up the judgment by *nil dicit* on the roll, and then take out an *habere facias poſſeſſionem.*

The court will not ſuffer a *tenant paravail* of the premiſſes, not intereſted in the right, to be turned out of poſſeſſion, on a judgment againſt the *caſual ejector.* For in ſuch caſe execution cannot be taken out without leave of the court, on which a rule to ſhew cauſe will be granted;—as in ejectment by *mortgagee*, execution cannot go to turn the *tenant* of *mortgagor* out of poſſeſſion without, when judgment has been obtained againſt the *caſual ejector.*

An attorney cannot appear for the *tenant* in poſſeſſion in ejectment, by order of the landlord. *Barnes*, 39.

But

Of appearing in EJECTMENT.

But if the tenant has refuſed to appear, and the *landlord*, according to the 11 *Geo.* 2. *c.* 19. would wiſh to defend, he muſt apply to the court for that purpoſe, on an *affidavit* of the *tenant*'s refuſal; and a copy of the rule for that purpoſe, when obtained of the *clerk of the rules in B. R. or ſecondary in C. B.* muſt be annexed to the plea and conſent rule.

The *affidavit* of the tenant's refuſing to defend an *ejectment*, in order to have the landlord admitted defendant, is as follows:

In the ——

Between { *John Den* on the demiſe of *William Smith*, plaintiff, and *Richard Fen*, defendant.

A. B. of, *&c.* maketh oath, that he this deponent, did, on the day of laſt, by the direction of *Thomas Hodgſon*, eſquire, landlord of the premiſſes in queſtion in this cauſe to apply to *John Bull*, tenant in poſſeſſion of the ſame premiſſes, to know whether he the ſaid *John Bull* would appear and become defendant in this cauſe; or would permit the ſaid *Thomas Hodgſon* to defend his title to the ſaid premiſſes, in the name of the ſaid *John Bull*; and this deponent, at the ſame time, ſhewed and offered to deliver to the ſaid *John Bull*, a note, ſigned by the ſaid *Thomas Hodgſon*, whereby the ſaid *Thomas Hodgſon* promiſed to defend and keep the ſaid *John Bull* of, from, and againſt all coſts and charges in this cauſe; and the ſaid *John Bull* told this deponent, that he would not appear and become defendant in this cauſe, or any way concern himſelf therein.

Sworn, *&c.* *A. B.*

Upon this *affidavit*, the landlord may appear and defend in like manner as the tenant might have done; and the method of appearing is as follows:

If the *tenant* or *landlord* appears, his attorney gets a blank conſent rule from a ſtationer, unſtamped, or from the *ſecondary* in *C. B.* then fills it up, making the *tenant* or *landlord* defendant, inſtead of the *caſual ejector*, entitling the cauſe in the margin, and inſerting the premiſſes, as deſcribed in the declaration, or ſuch part thereof as the party would wiſh to defend; then the attorney for the defendant ſigns his name at the bottom, leaving a blank ſpace for the plaintiff's attorney to do the like [for this is rather an agreement between the parties, than the *rule itſelf*, which is drawn out by the officer], and engroſſes the general

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general iſſue on ſtamped paper, and afterwards annexes the ſame to the rule [and if there is a rule to admit the *landlord* defendant, the tenant having refuſed, annex that alſo]; then file *common bail, if by bill in B. R. with the clerk of the common bails*; and if by *original in B. R.* enter the appearance with the *filazer*, who will mark it; or if in *C. B.* enter appearance with the *proper filazer*, who will ſtamp the rule; which being done there, if the proceedings are in *B. R.* you carry and leave this rule, *&c.* at any of the judges chambers; or if in *C. B.* you carry and leave the ſame with the *prothonotary*.

The appearance in ejectment ſhould be entered of the term mentioned in the notice. And where the notice to appear was in *Hilary*, and the tenant entered an appearance in *Michaelmas* following, and did nothing farther, and plaintiff finding no appearance of *Hilary*, and no common rule entered into or pleaded, ſigned judgment againſt the caſual ejector, the court held it regular; but afterwards ſet it aſide to try the merits. *Barnes*, 250.

The form of the conſent rule in **B. R.** is as follows:

Michaelmas term, in the twentieth year of king *George* the Third.

Middleſex. *Den*, on the demiſe of *Smith*, of four meſſuages, four barns, four ſtables, fifty acres of land, fifty acres of arable, fifty acres of paſture, twenty acres of wood, and twenty acres of underwood, with the appurtenances, ſituate in the pariſh of St. *Mary, Iſlington*, in the county of *Middleſex*.

It is ordered, by conſent of the attornies of both parties, that *John Bull* [the tenant or landlord, as the caſe is] be made defendant, in the ſtead of the now defendant *Richard Fen*, and do appear forthwith at the ſuit of the plaintiff, *and file common bail* [if *by original*, leave out theſe words], and receive a declaration in an action of treſpaſs and ejectment, for the premiſſes in queſtion in this cauſe, and forthwith plead thereto, not guilty; and upon the trial of the iſſue, confeſs leaſe, entry, and ouſter, and inſiſt upon the title only; otherwiſe, let judgment be entered for the plaintiff, againſt the now defendant *Richard Fen*, by default; and if, upon the trial of the iſſue, the ſaid *John Bull* ſhall not confeſs leaſe, entry, and ouſter, whereby the plaintiff ſhall not be able further to proſecute *his bill* [or if

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by original, his writ] againſt the ſaid *John Bull*, then no coſts ſhall be allowed for not proſecuting the ſame; but the ſaid *John Bull* ſhall pay coſts to the plaintiff in that caſe to be taxed. And it is further ordered, that if upon the trial of the ſaid iſſue, a verdict ſhould be given for the ſaid *John Bull*, or it ſhall happen, that the plaintiff ſhall not further proſecute his *ſaid bill* [or writ], for any other cauſe than for not confeſſing leaſe, entry, and ouſter, then the leſſor of the plaintiff ſhall pay to the ſaid *John Bull* his coſts in that behalf to be adjudged.

By the court.

O. P. for the leſſor of the plaintiff.
I. M. for the defendant.

The form of the conſent rule in C. B. is as follows:

Michaelmas term, in the twentieth year of king *George* the Third.

Middleſex, to wit. *Den* againſt *Fen*, for four meſſuages, four barns, four ſtables, *&c.* with the appurtenances, in the pariſh of St. *Mary*, *Iſlington*, in the county of *Middleſex*, on the demiſe of *William Smith*.

It is ordered, by conſent of *O. P.* attorney for the plaintiff, and *I. M.* attorney for *John Bull*, who claims title to the premiſſes in queſtion, that the ſaid *John Bull* ſhall be admitted defendant; and that the ſaid *John Bull* ſhall immediately appear by his ſaid attorney, who ſhall receive a declaration, and plead thereto the general iſſue this term; and at the trial to he had thereon, ſhall appear in his proper perſon, or by his counſel or attorney, and confeſs the leaſe, entry, and ouſter, of ſo much of the tenements ſpecified in the plaintiff's declaration, as are in the poſſeſſion of the ſaid defendant, or his tenants, or any perſons claiming by or under his title; or that in default thereof, judgment ſhall be thereupon entered againſt the defendant *Richard Fen*, the caſual ejector; but proceedings ſhall be ſtayed againſt him, until default ſhall be made in any of the premiſſes: And by the like conſent, it is further ordered, that if, by reaſon of any ſuch default, the plaintiff ſhall happen to be nonſuited upon the trial, the ſaid *John Bull* ſhall take notice thereof, and ſhall thereupon pay to the plaintiff, coſts to be taxed by the prothonotary.

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prothonotary. And it is further ordered, that the leſſor of the plaintiff ſhall be liable to the payment of coſts to the ſaid *John Bull*, by the court here to be in any manner allowed or adjudged.

By the court.

O. P. attorney for the plaintiff,
I. M. for the defendant.

If the defendant enters into the common rule, to confeſs *leaſe*, *entry*, and *ouſter*, for a part of the premiſſes only, his attorney ſhould give notice to the plaintiff's attorney, of what premiſſes he means to defend in this manner:

In the *King's Bench*, or *Common Pleas*. { *Den*, on the demiſe of *Smith* againſt *Fen*.

Sir,

Take notice, that I defend for a *meſſuage or tenement, a garden and ſtable* [ſpecifying the particular premiſſes], ſituate in the pariſh of St. *Mary, Iſlington*, now in the poſſeſſion of the ſaid *John Bull*, or his under-tenant.

Dated this day of 1780.

Your's, &c.

I. M. defendant's attorney,

To Mr. *O. P.* plaintiff's attorney.

If there be ſeveral perſons who claim title, the rule may be drawn *generally* or *ſpecially*. Generally, as that J. S. who claims title to the premiſſes in queſtion in his poſſeſſion ſhould be admitted defendant for ſuch meſſuages; and this puts a neceſſity on the plaintiff to diſtinguiſh, by proof, what tenements are in each tenant's poſſeſſion, otherwiſe he can have no verdict;—but if the rule be drawn ſpecially, that ſuperſedes the neceſſity of proof that the lands are in his poſſeſſion.

If one *tenant in common* bring ejectment againſt another, there is no occaſion to prove an *actual entry and ouſter*, for that is confeſſed by the rule. But if the fact be, that there has been no *actual ouſter*, the defendant ought to apply to the court not to compel him to confeſs, or to permit him to do it ſpecially; which the court will grant, where it is only matter of account, and the only ouſter is by pernancy of the profits, without an

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actual obſtruction of the other to occupy. *Wigfall* v. *Bridon*, *Eaſt.* 6 *Geo.* 3.

So that in ſuch caſe the defendant ſhould only confeſs *leaſe and entry*: for one *tenant in common* has no right to ouſt another.

In the caſe of *joint tenants* and *tenants in common*, receiving the whole profits, is no ejectment. *Co. L.* 199. *b.* nor levying a fine of the whole land. *Salk.* 286. Nor the not conſenting to have the rents raiſed. *Ca. K. B.* 657.

A tenant is not obliged to appear in ejectment, though the landlord is ready to indemnify him. *Barnes*, 173.

In *C. B.* it was moved, that the landlords, *viz. A. B.* and *C.* might be made defendants without the tenants in poſſeſſion, who refuſed to appear. But the motion was denied, and the common rule was made to add the landlords to the tenants in poſſeſſion. *Barnes*, 172.

In ejectment, on demiſe of *Stone and wife*, *Stone* moved, that the conditional rule entered into by his wife, by the name of *Anne Field*, widow, might be ſet aſide, upon affidavits tending to prove the marriage between *Stone* and her; and obtained a rule to ſhew cauſe. On ſhewing cauſe, *Anne Field* produced affidavits to ſhew a long cohabitation between her and the late counſellor *Field*, as huſband and wife; that he had a child by her, and deviſed the eſtate in queſtion to her, by the name of his wife; that *Stone* was married to and lived with another wife. The court thought the validity of *Stone*'s pretended marriage to *Field* a fit matter to be tried, and (the tenants having conſented to appear) ſet aſide the judgment ſigned againſt the caſual ejector, for want of their appearance, and ordered *Field*, the landlady, to be added a defendant to the tenants; whereby *Stone* was ſecured, if the plaintiff recovered in his coſts. *Barnes*, 189.

Motion, that Mr. *P.* who claimed title, might be made defendant, inſtead of the late tenant, who quitted poſſeſſion, denied. *Barnes*, 175.

In ejectment, the court denied to let the parſon of *Hampſtead* chapel defend, only for a right to enter and perform divine ſervice, notwithſtanding the caſe in *Salk.* 256. ſaying it had been often denied ſince. *Martin* v. *Davis*. *Stra.* 914.

Motion on affidavit, that the tenant in poſſeſſion was a material witneſs for the landlord; that therefore the landlord might be made a defendant, in the room of the tenant in poſſeſſion, objected; that it was never done, and it would not make

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make him a witneſs when done. And *per Cur.* He is liable for the *meſne* profits. The declaration is regularly delivered to the tenant in poſſeſſion. It was never done in this court. *Bourne* v. *Turner*, *Stra.* 632.

A motion was made on behalf of the tenant in poſſeſſion againſt *D.* an attorney, for appearing and pleading for him without authority. It appeared, that the tenant in poſſeſſion was tenant at will to infants; by order of whoſe guardian *D.* had appeared, and pleaded for the tenant, and offered the tenant ſecurity to indemnify him. But *per Cur.* a defence cannot be made for the tenant without his conſent; let the appearance and plea be withdrawn. *Barnes*, 39.

In *C. B.* the agents for the tenants in poſſeſſion entered their appearance with the *filazer*, and *ſent a note to plaintiff's agent that defendant) plead not guilty.* Plaintiff's agent ſigned judgment for want of a plea in form. The counſel for the tenants ſubmitted to the court, that according to the words of the rule for judgment againſt the caſual ejector, unleſs the tenants appear, a new declaration againſt the tenants ſhould in ſtrictneſs have been delivered before a plea in form could be required. Judgment ſet aſide, with coſts. *Barnes*, 270.

On motion for the landlord to defend upon the ſtatute of 11 *Geo.* 2. the court objected, that this motion could not properly be made till after judgment ſigned againſt the caſual ejector; and that an affidavit ought to be produced of the tenant's refuſal or neglect to appear. To which it was anſwered, that after judgment ſigned againſt the caſual ejector, the plaintiff might take poſſeſſion. But the court held the affidavit to be neceſſary, and made no rule; declaring, that the intent of ſigning judgment againſt the caſual ejector was only that the plaintiff, after having tried his cauſe againſt the landlord (the tenant not being a party), might have the benefit of his verdict, and take poſſeſſion under the judgment, which, under ſuch verdict, he could not. It ſeems reaſonable (upon a proper affidavit) to grant a rule to ſhew cauſe, before judgment againſt the caſual ejector can be ſigned, to prevent the ill conſequences of taking poſſeſſion immediately after. *Barnes*, 179.

The tenants had the forenoon of the 29*th of April in Eaſter term*, to appear in. *F.* the landlord, moved to add himſelf to the tenants; but no appearance being entered, plaintiff, on the 30*th*, ſigned judgment againſt the caſual ejector. The landlord afterwards, without diſcloſing to the court what had been previouſly done, applied for the conditional rule as a matter of

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courſe; and by virtue thereof, on the 1ſt of *May*, appeared alone without the tenants. Plaintiff moved to take out execution on the judgment, and on ſhewing cauſe, the judgment appeared to be regular, and the appearance out of time. Plaintiff offered to waive his judgment, if the landlord, who reſided at *Jamaica*, would give ſecurity for coſts; to which his counſel not conſenting, the court made the rule abſolute for leave to take out execution. *Barnes*, 186.

It was moved on the ſtatute 11 *Geo.* 2. that the landlord might be added defendant to *C. D.* one of his tenants, who appeared to defend the premiſſes in his poſſeſſion; and that as to the reſidue of the premiſſes contained in the declaration, in the poſſeſſion of *T. M.* another tenant, who refuſed to appear (as per affidavit), the landlord might appear, and defend ſingly; ruled accordingly, and that the plaintiff might ſign judgment againſt the caſual ejector, as to the tenements in poſſeſſion of *T. M.* but that the writ of *hab. fac. poſſ.* be ſtayed till further orders. *Barnes*, 179.

A regular judgment had been fairly obtained againſt the caſual ejector, the tenant having neglected to give notice to his landlord; for which reaſon the landlord moved to ſet aſide the judgment. The landlord was an infant, and therefore could not conſent to any iſſue. The court held, that the poſſeſſion ought not to be changed where there had been no trial, nor opportunity of trying; and ordered, that the tenant in poſſeſſion ſhould pay the coſts; that the regular judgment and writ of poſſeſſion ſhould be ſet aſide; that the landlord be made defendant, and not to ſet up any ſatisfied term or truſt eſtate; and to admit that *Z. T.* was ſeiſed. *Burr. Rep.* 4 *pt.* 1996.

Where the landlord is made defendant, the plaintiff muſt prove the landlord tenant in poſſeſſion of the premiſſes in queſtion. 1 *Wilſ.* 220.

A landlord was made defendant, according to the 11 *Geo.* 2. *c.* 19. *ſ.* 13. on the tenant's non-appearance, and entering into the common rule; and thereupon a ſtay of execution was ordered, until the court ſhould make further order. *Burr. Rep.* 4 *pt.* 757.

If a writ of error is brought by the landlord, it is a ſufficient reaſon againſt taking out execution. *Ibid.*

But the proper opportunity for the landlord to make his ſtand againſt the execution, is by ſhewing this as cauſe againſt the plaintiff's motion for leave to take it out. *Ibid.* And if he omits

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omits this opportunity, the execution regularly iſſued ſhall not be ſet aſide. *Ibid.*

A landlord made defendant without his tenant, may bring error and ſtay execution. *Stra.* 1241.

The landlord had applied to be made a defendant, and had entered into the common rule; but the leſſor of plaintiff had not joined in the *conſent rule*; and on motion to ſet aſide a rule to reply (as he could not be forced to proceed againſt a perſon whom he had never accepted as defendant) the court held the rule to be regular, and that the nominal plaintiff might be *nonproſſed* thereby; but being nominal, the defendant could have no coſts. 2 *Blackſtone Rep.* 763.

In *C. B.* the plea of *Marſhal and others*, landladies and tenants in poſſeſſion, who had appeared with the *filazer*, and entered into the common rule, was left in the prothonotary's office, entitled with the true name of the cauſe; but by miſtake in the body of the plea, the name of plaintiff's leſſor was inſerted (as the perſon complaining) inſtead of that of the nominal plaintiff. Plaintiff's attorney looking upon this plea as null and void, ſigned judgment againſt the caſual ejector; which judgment was ſet aſide, with coſts, as irregular; the plea is properly entitled, and not a nullity. *Barnes*, 191.

In *C. B.* the declaration was delivered to the tenant in poſſeſſion, without any *prothonotary's* name ſet thereon. Upon affidavit of ſervice, the court made a rule for the tenant to ſhew cauſe why, upon notice of the *prothonotary's* office, judgment ſhould not be entered againſt the caſual ejector, unleſs he (the tenant) appeared within the uſual time; which rule, on affidavit of ſervice, was made abſolute. *Barnes*, 192.

Motion was made to make the leſſor of the plaintiff's wife a defendant in *ejectment*, the plaintiff's title being by a pretended intermarriage, which was controverted. *Et per Holt, C. J.* To make the landlord a defendant in ejectment is of right; for otherwiſe he might loſe his poſſeſſion, by combination between the plaintiff and tenant in poſſeſſion; and the court inclined to grant the motion, becauſe there could be no inconvenience, and it would make the verdict more conſiderable; but in regard the wife lived in *Cheſhire*, and muſt have fourteen days notice of trial, and the defendant would not waive that, the court perceived it a trick to put off the trial; ſo nothing was done. 1 *Salk.* 157.

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The court will not endure a leſſee to defend (alone) an ejectment againſt his landlord, or thoſe claiming under him, on a ſuppoſed defect of title. 2 *Blackſ. Rep.* 1259.

When the rule for judgment againſt the *caſual ejector* is out, the plaintiff's attorney muſt ſearch at the chambers of the reſpective judges in *B. R.* for the defendant's plea (in caſe he has appeared) and conſent rule. To which, after the judge, with whom it was left, has ſigned it, and the plaintiff's attorney given a receipt for the ſame, he ſigns his name over the defendant's attorney, and then carries it to the *clerk of rules*, who files it, and draws up the conſent rule from it on ſtamp, for which he is paid 6*s.* of which rule the plaintiff's attorney makes a copy, and annexes the ſame to the iſſue, when delivered to the defendant's attorney for trial. But in *C. B.* when the defendant has appeared, and left the conſent rule in the prothonotary's office, the plaintiff's attorney reſorts there for it; and having ſigned his name over that of the defendant's attorney, he gets two rules from it, drawn up by the *ſecondary* on ſtamps, one for each party, for which he pays 7*s.* and then the plaintiff's attorney makes up the iſſue, and delivers a copy thereof, with notice of trial, on the defendant's attorney, and proceeds to trial as in other caſes.

If the plaintiff proceeds in ejectment *by original*, he does not ſue out his *original writ* at firſt, but proceeds by delivering his declaration as *by bill*; but if a *writ of error* ſhould be brought, he muſt ſue out his *original writ*, which muſt be returned by the ſheriff, and filed in the treaſury; or if the *tenant* has not appeared, the *original* muſt be ſued, returned, and filed properly; and if he has appeared, then, on ſuing out the *original*, you muſt inſert his name, inſtead of the nominal defendant.

The appearance, when by *original* in *B. R.* is entered with the *filazer*, in like manner as it is in other ſuits by *original*; and the writs are made out returnable on a *general return day*, as in other caſes.

The *præcipe* for the *curſitor*, to make out the *original writ* by, is as follows:

Middleſex, to wit. If *John Doe* ſhall make you ſecure, &c. then put, &c. *Richard Fen*, late of, &c. that he be before our lord the king, on wheresoever, &c. to ſhew wherefore, with force and arms, he entered into four meſſuages, &c. [reciting the premiſſes] with the appurtenances,

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tenances, in the pariſh of St. *Mary*, *Iſlington*, in the county of *Middleſex*, which *William Smith* demiſed to him for a term, which is not yet expired, and ejected, &c. and other enormities, &c. againſt the peace, &c. and to the damage, &c.

—— *January*, 1780.

O. P.

Ancient demeſne has always been held a good plea in ejectment.—But application to plead it muſt be made within the four days. *Vide Barnes*, 194. 187. It ought to be pleaded in the firſt *four days*. *Idem*, 331.

Of proceeding to recover Premiſſes according to the 4 *Geo.* 2. *c.* 28. by a Landlord having a Right of RE-ENTRY.

BY the * 4 *Geo.* 2. *c.* 28. *ſ.* 2. after reciting, that inconveniences often happen to landlords or leſſors in caſes of re-entry for non payment of rent, by reaſon of the many niceties that attend the re-entries at common law, *&c.*

It is enacted, "That in all caſes between landlord and "tenant, as often as it ſhall happen that *one half year's rent* "*ſhall be in arrear*, and the landlord or leſſor to whom the ſame "is due, hath right by law to re-enter for the non-payment "thereof; *ſuch landlord or leſſor ſhall and may, without any formal* "*demand or re-entry, ſerve a declaration in ejectment for the re-*"*very of the demiſed premiſſes*; or, in caſe the ſame cannot be "legally ſerved, or no tenant be in actual poſſeſſion of the pre-"miſſes, then to affix the ſame upon the door of any demiſed "meſſuage; or in caſe ſuch ejectment ſhall not be for the re-"covery of any meſſuage, then upon ſome notorious place of "the lands, tenements, or hereditaments, comprized in ſuch "declaration in ejectment; and ſuch affixing ſhall be deemed "legal ſervice thereof; which ſervice, or affixing ſuch decla-"ration in ejectment, ſhall ſtand in the place and ſtead of a "*demand and re-entry*; and, in caſe of judgment againſt the "caſual ejector, or non-ſuit, for not confeſſing, leaſe, entry "and ouſter, it ſhall be made appear to the court, where the "ſaid ſuit is depending, by affidavit, or be proved upon the "trial, in caſe the defendant appears, *that half a year's rent* "*was due before the ſaid declaration was ſerved*; *and that no ſuf-*"*ficient diſtreſs was to be found on the demiſed premiſſes counter-*"*vailing the arrears then due*; *and that the leſſor, or leſſors, in* "*ejectment, had power to re enter*; then, and in every ſuch caſe, "the leſſor or leſſors in ejectment ſhall recover judgment and "execution, in the ſame manner as if the rent in arrear had "been legally demanded, and a re-entry made; and in caſe "the leſſee or leſſees, his, her, or their aſſignee or aſſignees, "or other perſon or perſons claiming or deriving under the ſaid "leaſes, ſhall permit and ſuffer judgment to be had and reco-"vered on ſuch ejectment, and execution to be executed there-"on, without paying the rent and arrears, together with full "coſts, and without filing any bill or bills for relief in equity,

* This ſtatute relates only to *ejectments* for non-payment of rent, where the landlord has a right to re-enter.

"within

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" *within ſix calendar months after ſuch execution executed*; then, " and in ſuch caſe, ſuch leſſee, or leſſees, *&c.* and all others " claiming and deriving under the ſaid leaſe, ſhall be barred " or foreclоſed from all relief or remedy in law or equity, " other than by writ of error for reverſal of ſuch judgment, in " caſe the ſame ſhall be erroneous; and the ſaid landlord, or " leſſor, ſhall, from thenceforth, hold the ſaid demiſed pre- " miſſes diſcharged from ſuch leaſe: and if on ſuch ejectment " verdict ſhall paſs for the defendant, or the plaintiff ſhall be " nonſuited therein, except for the defendant's not confeſſing, " *&c.* then, in every ſuch caſe, ſuch defendant ſhall have and " recover his, her, or their full coſts: *Provided always*, That " nothing herein contained ſhall extend to bar the right of any " mortgagee or mortgagees, of ſuch leaſe, or any part thereof, " who ſhall not be in poſſeſſion, ſo as ſuch mortgagee, or " mortgagees, ſhall and do, within ſix calendar months after " ſuch judgment obtained, and execution executed, pay all " rent in arrear, and all coſts and damages ſuſtained by ſuch " leſſor, perſon or perſons entitled to the remainder or rever- " ſion as aforeſaid, and perform all the covenants and agree- " ments, which, on the part and behalf of the firſt leſſee or " leſſees, are and ought to be performed."

By *ſect.* 3. " A leſſee, filing a bill in equity, ſhall not have an injunction, unleſs within forty days after the anſwer of the leſſor, he bring into court ſo much as the leſſor ſhall in his ſaid anſwer ſwear to be due, over and above allowances and coſts, there to remain till hearing, or to be paid to the leſſor, ſubject to the decree of the court: and in caſe ſuch bill ſhall be filed within the time, and after execution executed, the leſſor of the plaintiff ſhall be accountable only for ſo much, and no more, as he ſhall *really* make *bonâ fide* of the demiſed premiſſes from the time of his entering into poſſeſſion; and if what ſhall be ſo made ſhall appear to be leſs than the rent reſerved on the leaſe, then the leſſee, *&c.* ſhall, before he be reſtored to his poſſeſſion, pay to the leſſor the deficiency."

Sect. 4. Provided, " That if the tenant, *&c.* ſhall, at any time before the trial in ſuch ejectment, pay, or tender to the leſſor, *&c.* or pay into court all the rent and arrears, together with coſts, then further proceedings on the ejectment ſhall ceaſe; and if the leſſee, *&c.* ſhall, upon the bill filed as aforeſaid, be re- lieved in equity, ſuch leſſee, *&c.* ſhall hold the demiſed premiſſes according

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according to the leaſe thereof, without any new leaſe to be made thereof."

The courts had permitted the tenant to bring into court the arrears of rent and coſt, antecedent to this act. *Salk.* 597.

Since this ſtatute, in ejectment by a landlord againſt his tenant, on a proviſo for *re-entry* for a forfeiture, the court of *B. R.* held, that the leſſor bringing *Covenant* for half a year's rent, ſubſequent to the time of the demiſe laid in the declaration in ejectment, was a waiver of the right of entry for the forfeiture, and an acknowledgment that the covenant then ſubſiſted. The law will always lean againſt forfeitures, as a court of equity relieve againſt them. *Doe ex dem. Crompton* v. *Minſhall. B. R. Eaſt.* 33 *Geo.* 2.

After an ejectment brought for the forfeiture of a leaſe on this ſtatute (there being half a year's rent in arrear, and no ſufficient diſtreſs on the premiſſes), if the landlord accept rent, it ſeems it ſhall be a waiver of the *forfeiture* of the leaſe; becauſe it is a *penalty*, and by accepting the rent, the party waives the *penalty*. *Cowp.* 247. An action for *double rent* on this ſtatute for holding over, will be barred by an *acceptance* of rent, accrued ſince.

Tender of rent, before an ejectment delivered, ſhall ſtay the proceedings under this act. 2 *Blackſ. Rep.* 746.

After judgment againſt the *caſual ejector*, and before any writ of poſſeſſion executed, the court made a rule to ſtay the proceedings, on payment of all rent due, and coſts, it not being pretended, that the ejectment was brought on any other title than a re-entry for non-payment of rent. *Stra.* 900.

Per lord *Manſfield*, in the caſe of *Doe ex dem. Hitchings* v. *Lewis*, *Burr.* 4 *pt.* 614. The true end of this act of parliament is to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of poſſeſſion [from its remaining in the power of the tenant to offer him a compenſation at any time, in order to found an application for relief *in equity*], and to limit and confine the tenant to *ſix calendar months* after execution executed, for his doing this; or elſe, that the landlord ſhould from thenceforth hold the demiſed premiſſes diſcharged from the leaſe.

In moving for judgment upon a *declaration* in ejectment delivered, or in caſe of no tenant affixed on the premiſſes, according to this act of 4 *Geo.* 2. *c.* 28. the courts require an *affidavit*, that there was half a year's rent in arrear before declaration

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declaration ſerved, that the leſſor of the plaintiff had a right to re-enter, that no ſufficient diſtreſs was to be found on the premiſſes countervailing the arrears of rent then due, that the premiſſes were untenanted, or that the tenant could not be legally ſerved with the declaration (as the caſe is), and that a copy of the declaration was affixed on the moſt notorious, and what part of the premiſſes, or the court will not give a rule for judgment.

The affidavit muſt be to the following effect;

In the ——

Between { *George Hunt* on the demiſe of *A. B.* plaintiff, againſt *Richard Roe* defendant in ejectment.

A. B. the leſſor of the plaintiff in this cauſe, and *John Dixon* of, *&c.* ſeverally make oath; and firſt, this deponent *John Dixon*, for himſelf, ſaith, that he this deponent did, on the day of inſtant, ſerve a true copy of the declaration in ejectment hereunto annexed, and the *Engliſh* notice thereunto written, by *affixing the ſame copy on the ſtreet door, or outward door, of the meſſuage* in queſtion, mentioned in the ſaid declaration, and late in the poſſeſſion of *Philip Howe:* and this deponent, *A. B.* ſaith, that half a year's rent then was and now is due, and in arrear to him this deponent, from the ſaid *Philip Howe*, before the ſaid declaration was ſerved: and this deponent further ſaith, that he this deponent then was, and now is, landlord of the ſaid meſſuage; and that the ſaid *Philip Howe* then was, and now is, tenant to this deponent, and holds the ſaid meſſuage by leaſe from this deponent; and this deponent alſo ſaith, *that it appears by the ſaid leaſe, that he the ſaid deponent then had, and now hath, power to re-enter on the ſaid meſſuage for the non payment of the ſaid half year's rent*; and this deponent further ſaith, that before the ſaid ejectment was ſerved, no ſufficient diſtreſs was to be found on the ſaid meſſuage, countervailing the arrears of rent then due to this deponent.

Sworn, *&c.*

This *affidavit* is only neceſſary upon moving for judgment againſt the *caſual ejector*, or after a nonſuit at the trial for the tenants not confeſſing *leaſe, entry and ouſter.*

But

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But if the tenant appears, and the ejectment comes to a trial, all the matters in the above *affidavit* muſt be proved upon the trial. *Per Denniſon* juſt. *in the caſe of Doe ex dem. Hitchings* v. *Lewis*, *Burr.* 4 *pt.* 614.

The late tenant, or other perſon, claiming title to the premiſſes, has the ſame time to appear in as is allowed to tenants in poſſeſſion.

In *ejectment* by a landlord, the tenant moved to ſtay proceedings upon payment of rent, arrear, and coſts, according to *ſect.* 4. of the above act. And, on a rule to ſhew cauſe, it was inſiſted for the plaintiff, that the caſe was not within the act, but that it was brought likewiſe on a clauſe of re-entry in the leaſe for not *repairing*; and the leaſe was produced in court. However, the rule was made abſolute, with liberty for the plaintiff to proceed upon any other title. *Piere ex demiſe. Withers* v. *Sturdy. H.* 1752.

Leſſors of plaintiff were both *deviſees* and *executors*, and in each capacity rent was due to them. Defendant moved to ſtay proceedings on payment of the rent due to leſſors of plaintiff as *deviſees*, they not being entitled to bring an ejectment as *executors*. There appeared to be a mutual debt due to defendant by ſimple contract, and defendant offered to go into the whole account, taking in both demands as *deviſees* and *executors*, having juſt allowances; which leſſors of plaintiff refuſed. The rule was made abſolute to ſtay proceedings, on payment of the rent due to leſſors, as *deviſees*, and coſts. *Duckworth ex dem. of Tubley and others* v. *Tunſtall. Barnes*, 184.

By this ſtatute 4 *Geo.* 2. where a landlord has a right of re-entry, and there is half a year's rent due and unpaid, and no ſufficient diſtreſs on the premiſſes, or the ſame are untenanted, there is no occaſion for the landlord to make an *actual entry, and ſeal a leaſe on the premiſſes in the preſence of ſome perſon*, as muſt be done in all other caſes where the premiſſes are untenanted. The method of proceeding to recover which, by a perſon claiming *title*, is as follows:

Since this ſtat. of *Geo.* 2. in ſuch ejectment by *leſſor* v. *leſſee*, on a condition of re-entry for non-payment of rent, proof of actual entry and ouſter is not neceſſary; nor need the demand of the money for the rent be proved, as formerly was required; as appears by 1 *Salk.* 259. 2 *Ld. Raym.* 750.

Of

Of proceeding in Ejectment on a VACANT Possession, or where the Premiſſes are UNTENANTED.

IN all caſes, where there is no tenant on the premiſſes, and the ſame are vacant [except in the caſe of *landlord* and *tenant*, where the landlord has a right of re-entry, on half a year's rent being due and unpaid, and he proceeds according to the 4 *Geo.* 2. *c.* 28. *ante*], the proceedings are in the old way by ſealing a leaſe on the premiſſes; and then, on the motion for judgment, there muſt be an *affidavit* of the ſealing of the leaſe, and the purport of it to be ſhortly ſet forth in the affidavit; and alſo in what manner the defendant got the poſſeſſion given to and taken from the leſſee (who is always made plaintiff), and how the declaration was delivered to the defendant, that the court may judge of the regularity of the proceedings.

The method of proceeding is thus:

A. (the perſon claiming title) ſigns the following letter of attorney, to empower *B.* to execute a leaſe in his name of the premiſſes in queſtion to *C.* which is done upon the premiſſes, *B.* and *C.* being only thereon; then *B.* after having executed the leaſe to *C.* leaves him in poſſeſſion of the premiſſes, who is turned out by *D.* to whom, while on the premiſſes, *E.* delivers a declaration in ejectment; and then, on *affidavit* of the due execution of the letter of attorney, and executing the leaſe in the above form, you move for judgment.

The letter of attorney is to the following effect:

"*KNOW* all men by theſe preſents, that I *A. B. &c.* have made, ordained, conſtituted, and in my ſtead and place, and by theſe preſents do make, ordain, conſtitute, and in my ſtead and place put *C. D.* of, *&c.* my true and lawful attorney, for me, and in my name to enter into and take poſſeſſion of all, *&c.* in the tenure of, *&c.* and when he hath taken poſſeſſion thereof, and for me, in my name, and as my deed, to ſeal and execute a leaſe of the ſaid premiſſes unto *E. F.* of, *&c.* to hold the ſame to him, his executors, adminiſtrators, and aſſigns, from laſt paſt, before the date hereof, for the term of years, at the yearly rent of a pepper-corn (if lawfully demanded), ſubject to a proviſo, to be void on my tendering of 6*d.* to the ſaid *E. F.*"

In witneſs, *&c.*

H. H. maketh oath, that he was preſent and did ſee *A. B.* of, *&c.* duly ſign, ſeal, and deliver the letter of attorney hereunto annexed.

The

Of proceeding in Ejectment on a VACANT POSSESSION, or where the Premiſſes are UNTENANTED.

The leaſe referred to by the above letter of attorney.

THIS INDENTURE made, *&c.* between *A. B.* of, *&c.* of the one part, and *E. F.* of, *&c.* of the other part, witneſſeth, that the ſaid *A. B.* for and in conſideration of the ſum of five ſhillings of lawful, *&c.* to him in hand paid by the ſaid *E. F.* at and before the ſealing and delivery of theſe preſents, the receipt whereof the ſaid *A. B.* doth hereby acknowledge, hath granted, demiſed, ſet, and to farm let unto the ſaid *E. F.* his executors and adminiſtrators, all, *&c.* now or late in the tenure of, *&c.* to have and to hold the ſaid herein before mentioned and hereby demiſed premiſſes, with all and every their appurtenances, unto the ſaid *E. F.* his executors, adminiſtrators, and aſſigns, from the day of laſt paſt, before the date of theſe preſents, unto the full end and term of five years from thence next enſuing, and fully to be compleat and ended, yielding and paying therefor, during the ſaid term, unto the ſaid *A. B.* or his aſſigns, the rent of one pepper-corn, at the feaſt of yearly (if lawfully demanded): Provided always, and theſe preſents are on this condition nevertheleſs, that if the ſaid *A. B.* or his aſſigns, ſhall, at any time or times hereafter, tender, or cauſe to be tendered, unto the ſaid *E. F.* the ſum of 6*d.* that then and in ſuch caſe, and from thenceforth, this indenture, and every thing herein contained, ſhall ceaſe, determine, and be abſolutely void; any thing herein contained to the contrary thereof in any wiſe notwithſtanding.

The attorney is to write the name of his principal.

Sealed and delivered as the act and deed of the above named *A. B.* by *C. D.* of, *&c.* by virtue of a letter of attorney to him for that purpoſe made by the ſaid *A. B.* bearing date the day of this inſtant, being firſt duly ſtamped in the preſence of

The form of the *affidavit* required of the proceedings in caſe of a vacant poſſeſſion, is as follows:

H. H. of, *&c.* maketh oath, and ſaith, that he this deponent, on, *&c.* now laſt paſt, did ſee *C. D.* of, *&c.* for and in

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the name of *A. B.* the leſſor of the premiſſes in this cauſe, ſeverally enter upon and take poſſeſſion of part of the premiſſes in the deed hereunto annexed mentioned, by entering into the firſt of the ſaid houſes, and putting his foot on the threſhold of the outer doors of two other of the ſaid houſes, the ſame being locked and uninhabited, ſo that no other entry thereon, or poſſeſſion thereof, could be made or taken without force. And this deponent did then likewiſe ſee the ſaid *C. D.* after ſuch his entry into and upon the ſaid premiſſes, and whilſt he was in ſuch poſſeſſion thereof as aforeſaid, at each of the ſaid houſes, ſeal and deliver the leaſe hereunto annexed unto the plaintiff; and further ſaith, that after the ſaid leaſe was ſo executed, this deponent did ſee the *plaintiff* take poſſeſſion of the ſaid three houſes, with their appurtenances, by virtue of the ſaid leaſe, by entering upon the threſhold of the ſaid outer doors of the ſaid three houſes, the ſame being then locked and uninhabited, and no other entry to be made therein, ſave as aforeſaid; and this deponent ſaith, that immediately afterwards, the *defendant* did enter each and every of the ſaid three houſes, and turned the *plaintiff* out of poſſeſſion thereof, by thruſting him out of the ſame; whereupon this deponent did then and there deliver and leave with the ſaid *defendant*, a true copy of the declaration hereunto annexed.

H. H.

Sworn, *&c.*

The declaration muſt be delivered, as in other caſes, before the *eſſoign day* of the term, in order to entitle the *plaintiff* to judgment as of that term; and there needs no notice at all at the end of the declaration; for inſtead of notice, the *plaintiff* only gives one rule to plead as in common actions; and on no plea being put in within the regular time, by the rule the plaintiff is entitled to judgment.

In *ejectment* for an empty houſe, a leaſe was ſealed upon the land, and a declaration delivered to the *caſual ejector*, and judgment and execution had; yet becauſe they had not moved for a peremptory rule to plead, the judgment was ſet aſide, and in ſuch caſe there muſt be an affidavit of the ſealing of the leaſe, entry, *&c.* 1 *Salk.* 255.

In caſes of *vacant poſſeſſion*, no perſon claiming title will be let in by the courts to defend; but he that can firſt ſeal a leaſe on

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on the premiſſes muſt obtain poſſeſſion. *Bull. Ni. Pri.* 96. 1 *Barnes*, 122. And therefore, the perſon claiming title muſt reſort to his new ejectment.

An ejectment on a *vacant* poſſeſſion in *London* or *Middleſex*, on the *4th of Geo.* 2. may be moved at any time in term, and is not within the old rule concerning motions in ejectment, *Trin.* 32 *Car.* 2. which relate only to declarations in ejectment ſerved upon *tenants in poſſeſſion*. *Barnes*, 172.

Motion for judgment in *London*, on a *vacant* poſſeſſion, where the notice to appear was not on the *firſt* day, but in the beginning of *Michaelmas term*; the court made a rule for judgment, unleſs ſome perſon claiming title appeared within four days. *Barnes*, 175.

Motion that *B.* and *B.* who claimed title to ſome lands and tenements in *Middleſex* (the poſſeſſion whereof was vacant), might be informed by the attorney for the perſon, who was carrying on the proceeding in the old way, under a leaſe ſealed on the premiſſes, of the names of the parties in ejectment, in order that *B.* and *B.* might appear and defend the title. It was urged for the attorney, that in all caſes of a *vacant* poſſeſſion, unleſs ſuch as are within the 4 *Geo.* 2. concerning landlords and tenants by leaſe, with a clauſe of re-enty, no inſtance can be ſhewn, where any perſon claiming title hath been let in to defend; but he that can firſt ſeal a leaſe upon the premiſſes, muſt obtain poſſeſſion, and any other perſon claiming title may eject him if he can; and by the courſe of the court, no defence can be made in theſe caſes but by the defendant in the ejectment, who is a real ejector. *Barnes*, 177. *Ex parte Beauchamp and Burt.*

Of Proceeding to recover Premiſſes by a Mortgagee.

IF a *mortgagee* of the premiſſes, having a right of entry, wants to get poſſeſſion of the premiſſes, and the ſame are untenanted, the *mortgagee* ſhould ſeal a leaſe, in order to nominate the *plaintiff in ejectment*; who is to be turned out by the nominal *defendant*, and then the *ejectment* muſt be delivered to the nominal *defendant*, to which declaration there is no need of notice as in other caſes.

Such mortgagee, or leſſor of plaintiff, ſhould enter upon and take poſſeſſion of the premiſſes in queſtion, by going upon the land; or, if a houſe, by putting his foot upon the threſhold of the houſe uninhabited; and then after ſuch entry, and whilſt he ſo remains on the premiſſes, ſeal and deliver a leaſe to the nominal *plaintiff*, and give him poſſeſſion; and after ſuch leaſe is executed, and nominal *plaintiff* taken poſſeſſion, then the nominal defendant muſt come and put the *plaintiff* by, and take poſſeſſion of the ſaid premiſſes; to whom, while he ſo remains in poſſeſſion, another perſon muſt deliver *the declaration in ejectment*.

The above leaſe differs not from a leaſe for a term [which vide *ante*], only at the end is inſerted the following clauſe: "Provided always, and it is the true intent and meaning of theſe preſents, that if I the ſaid leſſor of the ſaid *E. F.* my executors, adminiſtrators, or aſſigns, ſhall at any time hereafter tender to the ſaid *plaintiff*, his executors, adminiſtrators, or aſſigns, the ſum of one ſhilling; then theſe preſents, and every thing herein contained, ſhall be void and of no effect. In witneſs whereof, I the ſaid *A. B.* the leſſor of the plaintiff, have ſet my hand and ſeal the day and year firſt above written. Signed, ſealed, and delivered by the ſaid *A. B.* (leſſor or mortgagee) to the ſaid *E. F.* the tenant or leſſee, cloſe to the threſhold of the door of the ſaid meſſuage, in the preſence of us,

O. P.
Q. R."

Inſtead of the notice at the foot of the *declaration*, there muſt be a rule to plead given in this caſe, and the parties muſt be all real perſons.

When the rule to plead is out, judgment may be ſigned, and the *plaintiff* has no occaſion to move for judgment, as in other caſes.

If a *mortgagee* means only to get into the receipt of the rents and profits of the eſtate, he need not give notice to a tenant to

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quit, before bringing his ejectment, though the mortgage be made ſubſequent to the tenant's leaſe. But in ſuch caſe, he ſhall not be ſuffered to turn the tenant out of poſſeſſion by the execution. *White ex dem. Whatley* v. *Hawkins. Mich.* 14 *Geo.* 3. *Bull. Ni. Pri.* 96. And though, in this caſe, the leaſe was only from year to year, and, with reſpect to the laſt year, might be conſidered as a leaſe ſubſequent to the mortgage, yet the court held it would have been the ſame, if the leaſe were for a long term.

If a man makes a mortgage for years to *A.* who, without the mortgager's joining, aſſigns to *B.* who aſſigns to *C.* —*C.* may bring ejectment againſt the mortgager; for, upon executing the deed of mortgage, the mortgager, by the covenant to enjoy till default of payment, is *tenant at will*, and the aſſignment of the mortgagee could only make him *tenant at ſufferance*. 1 *Salk.* 245.

But it has been ſaid, that it would be otherwiſe, if the mortgager were to die, and his heir enter, and then the *mortgagee* make an aſſignment without entry, or the heir of the mortgager joining; for the entry of ſuch heir would be tortious, and conſequently, the *mortgagee* would be out of poſſeſſion, and his aſſignment void. *Ibid. Tamen quære.*

In ejectment of tenants of the *mortgager*, he defended, and plaintiff only proved the mortgage, and ſuch proof was held not to be ſufficient; for he ſhould have proved the lands in poſſeſſion of the perſons to whom the ejectments were delivered, as the defendant only admits himſelf landlord to them of lands in their poſſeſſion.

By the 7 *Geo.* 2. *c.* 20. An act for the more eaſy redemption and foreclоſure of mortgages, after reciting, that "*mortgagees* "frequently bring actions of ejectment for the recovery of "lands and eſtates to them mortgaged, and bring actions on "bonds given by *mortgagers* to pay the money ſecured by ſuch "mortgages, and for performing the covenants therein con-"tained; and likewiſe commence ſuits in equity, to foreclоſe "their *mortgagers* from redeeming their eſtates; and the courts "of law, where ſuch ejectments are brought, have not power "to compel ſuch *mortgagees* to accept the principal monies and "intereſts due on ſuch mortgages and coſts, or to ſtay ſuch "*mortgagers* from proceeding to judgment and execution in "ſuch actions, but ſuch *mortgagers* muſt have recourſe to "equity for that purpoſe; in which caſe likewiſe, the courts of "*Equity* do not give relief until the hearing of the cauſe:"

Of Proceeding to recover Premiſſes by a Mortgagee.

For remedy, *&c. it is enacted*, "That where any action ſhall "be brought on any *bond*, for payment of money ſecured by "ſuch mortgage, or performance of the covenants therein con- "tained, or where any action of *ejectment* ſhall be brought in "any of the courts at *Weſtminſter*, great ſeſſions, or ſuperior "courts of the counties palatine, by any *mortgagee*, *&c.* his "heirs, executors, adminiſtrators, or aſſigns, for the recovery "of the poſſeſſion of any mortgaged lands, *&c.* and no ſuit "ſhall be then depending in any of his majeſty's courts of "*Equity*, for or touching the foreclоſing or redeeming of ſuch "mortgaged premiſſes; if the perſon, having right to redeem "ſuch mortgaged premiſſes, and who ſhall appear and become "defendant in ſuch action, ſhall at any time, pending ſuch "action, *pay unto ſuch mortgagee*, &c. or, in caſe of his refuſal, "ſhall *bring into court*, where ſuch action ſhall be depending, "all the principal monies and intereſt due on ſuch mortgage, "and alſo all ſuch coſts as have been expended in any ſuit at "law or in equity upon ſuch mortgage [ſuch money for prin- "cipal, intereſt, and coſts, to be aſcertained and computed by "the proper officer of the court], the monies ſo paid, or "brought into court, ſhall be deemed and taken to be in full "ſatisfaction and diſcharge of ſuch mortgage; and the court "ſhall and may diſcharge ſuch *mortgager* of and from the ſame "accordingly; and ſhall and may, by rule of the ſame court, "compel ſuch *mortgagee*, at the coſts and charges of ſuch *mort-* "*gager*, to aſſign, ſurrender, or reconvey ſuch mortgaged pre- "miſſes, and ſuch an intereſt therein as the *mortgagee* hath, and "deliver up all deeds, *&c.* in his cuſtody, relating to the title "thereof, to the *mortgager*, who ſhall have paid or brought "ſuch monies into court, or his executors, *&c.* or other per- "ſon as he ſhall appoint."

The ſecond ſection enacts, "That on *bills of* foreclоſure "brought in equity for the payment of the money, or in de- "fault thereof for the recovery of the premiſſes, ſuch court of "equity, upon application of the defendant having a right to "redeem, and upon admiſſion of the plaintiff's right, may, "before hearing, make order therein, as if the cauſe had been "brought to a hearing, *&c.*"

Provided, "That this act ſhall not extend to caſes where "the right of redemption is controverted or the money due not "adjuſted, nor to prejudice any ſubſequent mortgage."

A judge made an order, purſuant to this act, to ſtay the *mortgagee's* proceeding in ejectment, upon bringing principal,

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intereſt, and coſts, into court; and a rule was made to make the order a rule of court *niſi cauſâ*. But it afterwards appearing to the court, that notice had been given by the *mortgagee* to the *mortgager*, that he inſiſted upon payment of two bonds, which were a lien upon the eſtate, the caſe was adjudged to be out of this act, and the rule *niſi* was diſcharged. *Barnes*, 177.

Motion to ſtay proceedings in ejectment, on payment of mortgage-money and coſts, purſuant to this act; on ſhewing cauſe, the plaintiff produced an affidavit, that the *mortgagee* had been at great expence in neceſſary repairs of part of the premiſſes in his poſſeſſion (tho ejectment was brought for the reſidue), and therefore prayed, that the *prothonotary* might be directed to make allowance for ſuch repairs. *Per Cur.* The rule muſt follow the words of the ſtatute. The prothonotary will make juſt allowances and deductions. *Barnes*, 176.

Rule on *ſtat.* 7 *Geo.* 2. to ſhew cauſe why proceeding ſhould not be ſtayed, on payment of mortgage-money and coſts, was made abſolute; the leſſor of plaintiff, aſſignees of the mortgagee inſiſted to be paid a bond, and a ſimple contract debt due to themſelves in their own right. *Per Cur.* A bond is no lien in equity, unleſs where the heir comes to redeem. *Barnes*, 182.

In *Mich. term*, 20 *Geo.* 3. *B. R.* a caſe reſerved from the *Oxford* circuit came on reſpecting a *mortgagee*'s getting into the receipt of the rents and profits of the eſtate. Caſe was as follows: The plaintiff obtained a leaſe of the premiſſes from *H.* 1 *January* 1772, for twenty years, rendering 40 *l.* rent, payable the 12*th* of *May*. In *May* 1772, *H.* mortgaged to the defendant *G.* The leſſee entered at the commencement of his term, and had paid all the rent to *H.* except 28 *l.* Afterwards, in *Nov.* 1778, *H.* became a bankrupt, the ſaid 28 *l.* being due to him for rent from the plaintiff; and more than that due from the bankrupt to the defendant *G.* for intereſt on the mortgage. 31 *December*, notice was given to the plaintiff of the bankruptcy of *H.* and a demand of the rent due was made by the *aſſignees*; and on 13*th January* following, notice was alſo given to the plaintiff of the mortgage, and a demand made of the ſaid rent in arrear by the defendant *G.* the *mortgagee*; which not being paid, *P.* the other defendant, by the direction of *G.* diſtrained for the ſaid rent, and gave notice. On which the plaintiff brought treſpaſs; and the court

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court held, that the *mortgagee* had the legal intereſt in the premiſſes; and that, after notice had been given by him, he might diſtrain for the rent due, and not paid to the *mortgager* before notice, to ſatisfy the arrears of intereſt due to him on the mortgage. *Moſs* v. *Gallimore and Pyott. Vide the Caſe. Dougl.* 266.

Since this caſe, it has become a common practice for a *mortgagee*, when he only means to get into the receipt of the rents to keep down the intereſt, to give notice to the tenant of his mortgage, and to pay the rents to him; inſtead of reſorting to an ejectment.

Where there are two or more mortgages, the court will not ſtay proceedings, and compel a redemption of one mortgage only, upon payment of the principal, intereſt, and coſts on that mortgage, without paying the reſt. *Roe ex dem. of Kaye* v. *Soley, aſſignee. Mich.* 11 *Geo.* 3. *C. B.* 2 *Blackſ. Rep.* 726.

Of amending the Declaration in Ejectment, staying Proceedings, conſolidating Declarations, &c.

IT is a rule in both courts, that no declaration in *ejectment* can be amended before appearance; and after appearance, amended only in form, but not in the demiſe, or other matter of ſubſtance. *Vide Barnes*, 186.

In the declaration delivered to the tenant in poſſeſſion, the *ſaid James*, inſtead of *John*, was ſaid to enter by virtue of the demiſe; and the court refuſed to amend it, for they conſidered it as proceſs: and Mr. juſtice *Wright* cited a caſe, *Hil.* 15 *Geo.* 2. where the premiſſes were laid to lie in *Twickenham* and *Iſleworth, or one of them*; and the court refuſed to let the plaintiff amend by ſtriking out the diſjunctive words. *Stra.* 1211.

But if the declarations delivered be right, it ſeems, that they will be a ſufficient warrant to amend the declaration *on record* by. *Vide* 2 *Ld. Raym.* 896.

The demiſe was laid in 1697, inſtead of 1696;—1697 not being come at the time of the trial. And it was holden not to be amendable after verdict, becauſe it would be another title.

The term in ejectment being near expiring it was amended, without *any conſent*, from five years to ten years. *Oats* v. *Shepherd*, *Stra.* 1272. But *vide Salk.* 257. if the term expires, pending the ſuit, it cannot be enlarged without conſent.

And there ſaid, that a common law court will not enlarge the term in ejectment, where the plaintiff has been hung up by an injunction out of *Chancery*, without conſent.

A cauſe was hung up ſo long by agreement, on ſpecial verdict, that the term expired, and the court would not enlarge it.

On *ſpecial* verdict in ejectment, the matter of law had been argued, and the court having taken time to conſider, plaintiff moved to enlarge the demiſe, which was near expiring; but defendant not conſenting, the court declared they had no power to enlarge the demiſe without conſent. *Barnes*, 8.

Declaration in ejectment amended by making the verbs in the plural number, *they entered*, inſtead of *he entered*, &c. *Stra.* 807.

On a rule to ſhew cauſe, why a declaration in ejectment ſhould not be amended on payment of coſts, by altering the time of the demiſe, where the plaintiff had been barred by a

fine

Of amending the Declaration in Ejectment, ſtaying Proceedings, conſolidating Declarations, &c.

fine from bringing a new ejectment; the rule was made *abſolute*. *Burr. Rep.* 4 *pt.* 2446.

The term in ejectment was enlarged, being expired twelve years before the action brought, on payment of coſts; the cauſe being at iſſue, a ſpecial jury ſtruck, and the parties gone down to trial, before the miſtake was diſcovered. *Roe ex dem. Lee* v. *Ellis. C. P. Eaſt.* 14 *Geo.* 3. 2 *Blackſ. Rep.* 940.

Ten declarations on the ſame demiſe were delivered for ten houſes in *Steyning* in *Suſſex*, in the occupation of *ten perſons*; and on motion to conſolidate them, and put them all in one iſſue, upon ſuggeſtion that the title was the ſame in all, the court refuſed it; for they ſaid the leſſor might have ſued them at ten different times, and it would be obliging him to go on againſt all, when perhaps he might be ready in ſome of them only. *Strg.* 1149.

But in *C. B.* on motion to conſolidate *ſixteen ejectments* in one, after ſixteen ſeveral iſſues joined, and though it was urged for the plaintiff, that the iſſues were delivered and paid for a long time ago, the court held, that it was neceſſary for the defendants to pay for the iſſues to prevent judgment, and ordered the ejectments to be conſolidated.

N. B. Each declaration contained a large number of meſſuages, and they were word for word the ſame. Had each been for one meſſuage only, the plaintiff might have tried them ſeparately. *Barnes*, 176.

Proceedings were ſtayed till the leſſor of the plaintiff ſhould give ſecurity for the coſts [his reſidence being in *Ireland*], although this ejectment was brought under the direction of the court of *Chancery*, and 40*l.* ſecurity had been already given there. *Burr.* 4 *pt.* 1177.

If the leſſor of the plaintiff is an infant, the court on motion will oblige him to name a good plaintiff who will be anſwerable for coſts. *Strg.* 694. 932. *Barnes*, 183.

Upon affidavit of the death of *leſſor* of plaintiff, a rule was made to ſhew cauſe, why proceedings ſhould not be ſtayed, till ſome perſon gives ſecurity for defendant's coſts, if any ſhall be adjudged to him. The court thought ſecurity ought to be given; but plaintiff's attorney undertaking for the payment of ſuch coſts, the rule was diſcharged. *Barnes*, 147.

If a ſecond ejectment is brought, the coſts of the firſt not being paid, the court on motion will ſtay proceedings therein

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till thoſe coſts are paid. Lord *Conyngſby*'s caſe. *Stra.* 548. *Ibid.* 1152. So proceedings ſtayed in error, and a ſecond ejectment, the plaintiff not being able to ſhew that the writ of error was brought with any other view than to keep off the payment of coſts. *Stra.* 554.

All the courts conſider a former ejectment in another court, as they do a former ejectment in the ſame court, and will ſtay proceedings in a new one, till the coſts of the former are paid. *Barnes*, 133.

In *C. B.* proceedings in a ſecond ejectment were ſtayed the day before trial, till the coſts of the former ejectment in *B. R.* were paid. 2 *Blackſ. Rep.* 1158.

So proceedings in a ſecond ejectment ſhall ſtay, till the coſts of a former are paid; though in ſuch former ejectment the leſſor of plaintiff never entered into the conſent rule. 2 *Blackſ. Rep.* 904.

A former ejectment had been brought on the demiſe of the ſame leſſors, wherein defendants had a verdict, and obtained an *attachment* againſt *R. M.* one of the leſſors, for non-payment of coſts; whereupon he was arreſted, and detained in cuſtody: and a new ejectment being brought, defendant moved to ſtay the proceedings till the coſts of the former were paid. But *per Cur.* the leſſor of plaintiff being in cuſtody upon the attachment for coſts, which is in nature of a *ca. ſa.* there is no reaſon to grant the rule. *Barnes*, 180.

But where the plaintiff in ejectment having declared on one demiſe, to which not guilty was pleaded; but afterwards finding it neceſſary to add another demiſe of truſtees, he delivered a new ejectment on the double demiſe; and on motion to ſtay proceedings on the laſt, till payment of coſts, and for notice where the leſſors were to be found [grounding the motion, as to the firſt part, on lord *Conyngſby*'s caſe; and as to the latter, on the common caſe of a *qui tam*; becauſe here the leſſor was to enter into a rule],—the court granted the laſt part; but as to the coſts, they ſaid, it was never done but where it appeared the party was vexatious, or had run the defendant to a great expence; as was lord *Conyngſby*'s caſe, who came for a trial at bar on his new ejectment, after the former cauſe was ready for the bar, which was a matter of mere favour, in which they might make their own terms. *Short* v. *King*. *Stra.* 681.

The

Of amending the Declaration in Ejectment, ſtaying Proceedings, conſolidating Declarations, &c.

The leſſors of plaintiff delivered three ejectments in *C. B.* and two in *B. R.* for the ſame tenements, and made the defendants attend at five aſſizes, but countermanded in time to ſave coſts; and on application to ſtay proceedings in the laſt ejectment, till coſts paid of the former, on account of the vexation,—The court would not do it, inaſmuch as coſts were not demandable by the rules of the court. *Stra.* 1099.

The court will not give plaintiff leave to diſcontinue after a ſpecial verdict has been had, in order to adduce freſh proof in contradiction to the verdict. *Roe ex dem. of Gray* v. *Gray. C. B. Eaſt.* 12 *Geo.* 3. 2 *Blackſ. Rep.* 815.

Of

Of making up the NISI PRIUS Record in Ejectment.

IF the tenant or landlord appears, the plaintiff having got the plea and rule, muſt draw up the iſſue, entitling it of the ſame term as the plea is of; then copy the conſent rule, and annex the ſame to the iſſue; indorſe thereon the notice for trial, and deliver the ſame to the defendant's attorney, charging 4*d. per* ſheet; and alſo for entering the plea and conſent rule. The defendant's attorney muſt pay for the iſſue, or the plaintiff may ſign judgment.

The *niſi prius* records in ejectment are made up in the ſame manner as *niſi prius records* in other actions, for which ſee the firſt volume, obſerving the diſtinction between proceedings by *original* and *by bill*.

If the plaintiff, after iſſue, and before the trial, enter into part, the defendant may, at the aſſizes, plead this as a plea *puis darrein continuance*, in bar to the plaintiff's action; but it is at the diſcretion of the juſtices, whether they will receive it; but if they do, it ſtops the trial, and the plaint *i* is not to reply to it at the aſſizes; but the judge is to return it as parcel of the record of *niſi prius*. *Yelv.* 180. *Cro. Car.* 261.

The plaintiff has a right to proceed, both for the poſſeſſion and the treſpaſs; and therefore the death of the leſſor [though only tenant for life], is no abatement; but if the plaintiff, in ſuch caſe, inſiſt to go on, the court will oblige him to give ſecurity for payment of the coſts, in caſe judgment go againſt him. *Stra.* 1056.

There can be no alteration in the declaration in the iſſue from the firſt declaration delivered, only in the defendant's name. And on motion, *B. R.* made a rule, that the iſſue ſhould be made according to the declaration delivered againſt the *caſual ejector*, it having been altered as to the demiſe. *Ld. Raym.* 1411.

After defendants had appeared, pleaded, and entered into the common rule by conſent, their attorney neglected to pay for the iſſue-book, whereupon judgment was ſigned againſt the *caſual ejector*; which, on motion, was ſet aſide as irregular. Plaintiff might have ſigned judgment againſt defendants, who had appeared, for non-payment of the iſſue-book, but not againſt *caſual ejector*. *Barnes*, 253.

Of the Trial in Ejectment, and of Judgment againſt the CASUAL EJECTOR for the Defendants not appearing and confeſſing, &c. at the Trial.

IF on the trial the defendant will not appear, and confeſs *leaſe, entry and ouſter*, the courſe is to call the defendant to confeſs, &c. and his attorney, if he be within the rule, and then to call the plaintiff and nonſuit him; and pray to have it indorſed on the *poſtea*, that the nonſuit was for not confeſſing *leaſe, entry and ouſter*, and then upon the return of the *poſtea*, judgment will be given againſt the *caſual ejector*, becauſe the defendant has not complied with the terms of the *rule*, upon which the court admitted him to be the defendant. Afterwards, on application to the *maſter* or *prothonotary*, coſts will be taxed upon the *rule* for confeſſing *leaſe, entry and ouſter*; and if the ſame are demanded of the defendant, and he refuſes to pay them, the court will, on motion and affidavit of ſuch refuſal, grant an attachment againſt him. *Salk.* 259.

If there be ſeveral *defendants*, and ſome of them do not appear and confeſs, according to the old method, a verdict was to be taken for them. And the *poſtea* was indorſed, that the verdict was for them becauſe they did not confeſs; and then the plaintiff, upon the return of the *poſtea*, had judgment againſt the caſual ejector for ſuch lands as were in the poſſeſſion of thoſe who did not confeſs. *Claxmore* v. *Searle & al. Ld. Raym.* 729.

But it is ſaid in *Salk.* 456, that by a rule made 4 *Ann.* in *B. R.* In ſuch caſe the plaintiff ſhall go on againſt thoſe who will confeſs, and ſhall be nonſuited as to thoſe who will not confeſs; but the cauſe of the nonſuit ſhall be expreſſed on the record; and then upon the return of the *poſtea*, the court being informed what lands were in the poſſeſſion of thoſe defendants, judgment ſhall be entered againſt the *caſual ejector* as to them. Mr. *Buller*, in his *Niſi Prius*, ſays, that he could find no ſuch rule in the printed book; and that in the caſe of *Ellis* v. *Knowles*, *E.* 7 *Geo.* 2. *C. B.* 1 *Barnes*, 118. upon the above precedent of *Claxmore* v. *Searle & al.* judgment was given, on motion, againſt the *caſual ejector*, as to ſuch of the defendants as were acquitted at the trial for not confeſſing, as appeared by indorſement on the *poſtea*, which ſeems to be the right way. Vide *Bull. Ni. Pri.* 98.

A rule was made to ſhew cauſe, why a *non-proſ.* for not confeſſing *leaſe, entry and ouſter*, ſhould not be ſet aſide, there being a material variance between the iſſue and the record; the defendant therefore did not confeſs. *Per Cur.* Confeſſion would not

Of the Trial in Ejectment, and of Judgment againſt the CASUAL EJECTOR for the Defendants not appearing and confeſſing, &c. at the Trial.

not have been a defence; defendant might have afterwards moved to ſet aſide the verdict for the variance; the non-proſ. is regular; but let it be ſet aſide on payment of coſts. *Barnes*, 175.

Upon the trial, one of the defendants confeſſed *leaſe, entry and ouſter*, and a verdict was found againſt him for one third of the tenements in queſtion. The other defendant did not confeſs, and againſt him plaintiff moved for coſts, which in this caſe he could not have upon the common rule by conſent. The court made a rule to ſhew cauſe, which was afterwards made abſolute, no cauſe being ſhewn. *Barnes*, 121.

Verdict againſt defendant *A.* who on the trial appeared, and confeſſed *leaſe, entry and ouſter*; the other defendants did not appear and confeſs; thereupon they, according to the uſual practice in ſuch caſe, were found not guilty.—Plaintiff obtained leave to ſue out an *habere facias poſſeſſionem* on the judgment againſt the *caſual ejector* as to them, and got his coſts taxed on the *poſtea*; for which coſts he thereby could only have remedy againſt defendant *A.* He then moved that the prothonotary ſhould tax his coſts againſt *B.* (one of defendants who did not appear and confeſs), on the common rule, by conſent entered into for him, whereon a rule was firſt made to ſhew cauſe, and afterwards abſolute. *Barnes*, 149.

Of proceeding when the Plaintiff is nonſuited at the Trial, and of the Plaintiff's recovering his Coſts of a Nonſuit for not confeſſing, &c.

IF a *verdict* is given for the defendant, or the plaintiff is nonſuited for any other cauſe than for the defendant's not confeſſing *leaſe, entry and ouſter*, the defendant muſt proceed to tax his coſts on the *poſtea* as in other actions, and ſue out a *capias ad ſatisfaciendum* againſt the plaintiff; and if upon ſhewing the ſaid writ under ſeal to the leſſor of the plaintiff, and ſerving him with a copy of the rule by conſent to confeſs *leaſe, entry and ouſter*, the leſſor of the plaintiff does not pay them, the court will grant an attachment againſt him.

If the plaintiff is nonſuited, he may pay the coſts to which of the defendants he pleaſes. *Stra.* 516.

The *plaintiff* in ejectment is a mere nominal perſon, and truſtee for the leſſor; and therefore he cannot releaſe the action without being guilty of a contempt; or if an action for *meſne profits* after recovery be brought in his name, and he releaſes it, he may be committed for a contempt.

So the *caſual ejector* is only a nominal perſon, and has no intereſt in the premiſſes, therefore a *caſual ejector* cannot confeſs judgment. *Stra.* 531.

The *nominal plaintiff* and *caſual ejector* ſtand in the ſame light; the *nominal plaintiff* cannot releaſe the action; the *caſual ejector* cannot bring error. *Barnes*, 189.

Defendant at the trial did not appear to confeſs, *&c.* a nonſuit happened; and afterwards the plaintiff's leſſor, inſtead of taking his remedy for the coſts taxed upon the common rule as he ought to have done, entered judgment againſt the *caſual ejector*, ſued out a *fi. fa.* againſt the defendant's goods, and levied his coſts thereon, acting as ſpecial bailiff himſelf. An action being brought for this irregular levy in *B. R.* the defendant moved in *C. B.* to ſet aſide the *fi. fa.* and the court ordered reſtitution to be made, and the defendant's coſts to be paid by the leſſor and his attorney; and by conſent the action in *B. R.* to be diſcontinued without coſts, and no other action brought. *Barnes*, 182.

Defendant, the landlord admitted to defend by ſpecial rule, did not appear at the trial to confeſs *leaſe, entry and ouſter*, whereby plaintiff was nonſuited. Plaintiff produced the *poſtea*, and moved for leave to take out execution againſt the *caſual ejector*,

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ejector, upon the judgment signed by virtue of the special rule to defend, which was granted absolutely. *Barnes*, 182.

Though defendant confess *lease*, *entry and ouster*, yet he may deny that he is in possession of the premisses for which the plaintiff goes, and put the plaintiff upon proving it; and if he cannot, he will be *nonsuited*. *Smith* v. *Mann*. *Tr.* 21 *Geo.* 2. on a case reserved.

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AS the verdict is the ground of the judgment, it ought not to be entered for more land or different parcels than the defendant was found guilty of by the verdict; but a variance between the verdict and judgment occaſioned by the miſpriſion or default of the clerk in entering the judgment, is not fatal, but hath been amended by the court after a writ of error brought.—As where the plaintiff had judgment, "*That he recover his term* of a meſſuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land [by which the judgment was larger than the verdict], and, becauſe it appeared to be the miſpriſion of the clerk, who had not purſued the verdict which ought to have been his guide in making up the judgment, and no miſtake in point of law in giving the judgment, therefore the party ought not to ſuffer for his miſpriſion, ſince the ſtatute of 8 *H.* 6. *c.* 12. gives the judges, in affirmance of their judgment, power to amend and reform what in their diſcretion ſeems to be the miſpriſion of clerks.

If the plaintiff has a verdict for all, the entry of the judgment is, that "*the plaintiff recover his term againſt the defendant of and in the premiſſes aforeſaid*;" and till the ſtatute 5 & 6 *W.* & *M.* took away the *capiatur* fine, there uſed to be alſo judgment *quod capiatur*. *Carth.* 390.

But if the judgment in ejectment be entered, "that he recover poſſeſſion of the term aforeſaid," this is as well as if it had been, "that he recover his aforeſaid term," becauſe both ſignify the ſame thing, the poſſeſſion itſelf being to be recovered on the *habere facias poſſeſſionem*. *Law of Eject.*

And hence it is, that if the term expires pending the ſuit, the plaintiff cannot recover the poſſeſſion, becauſe the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record that his title to it is determined: yet he ſhall have his judgment for damages, becauſe the treſpaſs ſtill remained. *Sav.* 28. *Co. Lit.* 285.

If a material witneſs for defendant be alſo made a defendant, the right way is for him to let judgment go by *default*; but if he pleads, and by that means admit himſelf tenant in poſſeſſion, the court will not afterwards, upon motion, ſtrike out his name. But in ſuch caſe, if he conſent to let a verdict be given againſt him, for as much as he is proved to be in poſſeſſion of, I ſee no reaſon why he ſhould not be a witneſs for another defendant. *Bull Ni. Pri.* 98.

If the defendant be acquitted of part, and judgment be entered *quod def. ſit quietus quoad, &c.* that part whereof he is acquitted,

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acquitted, this is error: becauſe the judgment in this action is not final as in the writs of right, and the judgment in this action does not protect the defendant from any further ſuit, but only quits againſt the title ſet up by the plaintiff in that action. But ſince it appears that the plaintiff's demand was groundleſs as to that part whereof the defendant was acquitted, the judgment as to that part muſt be ſet down to be *quod def. eat inde ſine die.* The plaintiff as to that having no further cauſe to detain him longer in court. *Cro. Eliz.* 763.

If one of the defendants die after a verdict, the plaintiff ſhall have judgment againſt the ſurvivors, on his ſuggeſting the death of one on the roll; but then the judgment muſt be entered as to the perſon deceaſed, *quod quer. nil capiat. Moor.* 469. *Cro. Car.* 513. 14. *Jon.* 401. *Law Eject.* 97. 8.

If an ejectment be brought againſt baron and feme, and the plaintiff hath a verdict againſt both, and before judgment the huſband dies, the plaintiff may, on the ſuggeſtion, have judgment againſt the wife; not only becauſe this is a treſpaſs committed by the wife, and that therefore ſhe is puniſhable for her own act, which is injurious to another; but becauſe, where the wife is found guilty of the ejectment, ſhe muſt have obtained that unlawful poſſeſſion, either jointly with her huſband, and then it ſurvives, or elſe ſhe had the whole poſſeſſion in her own right; and in either caſe the plaintiff may puniſh her, and recover the poſſeſſion, which is wholly in her on the death of her huſband. *Roll. Rep.* 14. *Cro. Jac.* 356.

It was formerly held, that if a demiſe was laid in the declaration for a longer term than the leſſor had intereſt in the premiſſes, the plaintiff could not recover. *Per Hale. Tr.* 27 *Car.* 2. But upon an objection made at *ni. pri.* where the demiſe was laid for a longer term than the leſſor had title; and 2 *Leo.* 140. *Brown,* 133. were cited in ſupport of it, lord *Manſfield* ſaid, "There is nothing in the objection, for if the leſſor have a title, though but for a week, he ought to recover; for the true queſtion in ejectment is, who has the poſſeſſory right. Suppoſe a perſon has an intereſt for three years only, and ſhould make a leaſe for five, it would be good for the three years. *Bull. Ni. Pri.* 106.

If plaintiff after iſſue, and before trial, enter into part, the defendant may at the aſſizes plead this as a plea *puis darrein continuance* in bar to plaintiff's action; but it is at the diſcretion of the juſtices whether they will receive it; but if they do, it

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ſtops the trial, and the plaintiff is not to reply to it at the aſſizes, but the judge is to return it as parcel of the record of *ni. pri.* *Yelv.* 180. *Cro. Car.* 261.

The tenant in poſſeſſion not appearing at the trial to confeſs *leaſe, entry, and ouſter*, judgment was entered againſt *caſual* ejector. *A.* an attorney, brought a writ of error in the name of the *caſual ejector*, which he was ordered to *nonpros* at his own expence, and pay coſts; but was excuſed from farther cenſure, it appearing that he had been informed by ſome of the *curſitor's clerks*, that ſuch writ of error might be brought. *Barnes*, 181.

A writ of error will lie on a judgment in ejectment, *quod recuperet*, &c. *Carth.* 205.

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IF by any intendment a judgment in ejectment after a verdict can be made good, the court will do it. As where on *error* brought after judgment for plaintiff, that he recover his *terms*, when the declaration was on two ſeparate demiſes, by two different leſſors of the very ſame premiſſes, and for the very ſame term; and though objected, that the judgment being to recover his *terms* in the plural number, was wrong, as both the leſſors could not have title to the ſame premiſſes at one and the ſame time, the court affirmed the judgment. And the chief juſtice cited a caſe, *Trin.* 4 & 5 *Geo.* 3. *Fiſher* and *Hughes*, where, upon three demiſes, by ſeveral leſſors of the ſame premiſſes, and judgment as to two demiſes, was entered for the plaintiff; and as to the other, for the defendant; the objection being, that there was judgment both for the plaintiff and defendant, yet the court held the judgment right. 1 *Wilſ.* 1. *S. C. Stra.* 1180.

So, where after judgment to recover his *term*, when there were two demiſes of different lands, and *error* brought, and objected, that the judgment being in the ſingular number to recover his *term*, was wrong. *Per Cur.* The judgment is to recover his term *de & in tenementis prædict.* which *reddendo ſingula ſingulis* is well enough, for there is but one term in each part of the premiſſes. *Stra.* 835.

But where on motion in arreſt of judgment, the words in the declaration being one meſſuage or *tenement*, which is too uncertain, as *tenement* is all a man holds, and after judgment, the ſheriff cannot tell of what to deliver poſſeſſion, the court made a rule to ſtay judgment till cauſe ſhewn, and afterwards judgment was arreſted. *Barnes*, 174.

The ejectment was brought for one meſſuage, with the appurtenances in the pariſhes of *A. or B. or one of them*; and though after a verdict for plaintiff, judgment was arreſted for the uncertainty. *Barnes*, 184.

The *Engliſh* notice at the foot of the declaration, was ſubſcribed by the nominal plaintiff, inſtead of the caſual ejector, which the court held bad, and diſcharged the rule for judgment. *Barnes*, 172. The ſame caſe in *B. R. H.* 2 *Geo.* 2. *Barker* v. *Meriſield.*

After *verdict* for plaintiff in ejectment, and motion in arreſt of judgment, becauſe the demiſe was laid on a day not then arrived, held to be no objection. *Burr.* 4 *pt.* 1159.

The death of the *plaintiff* in ejectment, is no ground for a motion to arreſt the judgment. 1 *Mod.* 252.

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In ejectment against *two* defendants, the declaration was, that *he* entered instead of *they* entered; and on motion in arrest of judgment, the court at first held it to be bad, but afterwards ordered it to be amended on the authorities of *Cro. Jac.* 306. And plaintiff had judgment. *Salk.* 48.

Trespass and ejectment by *original*; motion in arrest of judgment upon a fault in the original [for a bad original is not helped by verdict]; but the master certifying there was no original at all, the plaintiff had judgment, though in his declaration he recited an *original*. 1 *Mod.* 3.

The plea of the landlords and tenants, who had appeared with the *filazer*, and entered into the common rule, was left in the prothonotary's office, entitled with the true name of the cause; but, by mistake, in the plea was inserted the name of the plaintiff's *lessor* (as complaining) instead of that of the nominal plaintiff; upon which the attorney, conceiving the plea to be a nullity, signed judgment against the casual ejector; which judgment, upon application to the court, was set aside with costs. *Barnes*, 191.

Where judgment is obtained against the casual ejector, and a trial is not lost, the courts will, on the defendant's application, his payment of costs, and entering into the common rule, to confess *lease, entry, and ouster*, set aside such judgment in ejectment (as well as in other actions), and not put the tenant to the charge, inconvenience, and hazard of recovering back his possession, by another action. *Stra.* 975.

There is no distinction between a judgment in ejectment upon a *verdict*, and one *by default*; in the former, the plaintiff's right is found, in the latter, confessed. *Burr. Rep.* 4 *pt.* 667.

A regular judgment in ejectment may be set aside both in *B. R.* and *C. B. Stra.* 975.

In the declaration in stating the demise, the *ville* was omitted where the lands laid, but in the subsequent part, the ejectment was stated to have been at *Haswell*. And it being moved in arrest of judgment, the court held, that it amounted to a sufficient certainty, that the lands lay in the *ville* of *Haswell*, and discharged the rule. 2 *Black. Rep.* 706.

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IF the plaintiff has judgment to recover his term; he may enter without ſuing out an *habere facias poſſeſſionem*; for where the land recovered is certain, the recoverer may enter at his own peril, and the aſſiſtance of the ſheriff is only to preſerve the peace. 2 *Sid.* 156. 1 *Roll. Rep.* 213. *Noy*, 71. *Palm.* 263.

But although, after judgment, the plaintiff is entitled to and may ſue out an *habere facias poſſeſſionem*, yet if he neglect to ſue out execution within a year after the judgment, he muſt bring a *ſcire facias* to revive the judgment * as in other caſes, otherwiſe the court will award a reſtitution *quia erronicè emanavit.*

The defendant in ejectment died, and a *ſcire facias* went out againſt the tertenants of the land, which was demurred unto, for that the heir was not named, nor was it alledged that any ſtrangers had intruded; but the court ruled it well, for the heir may come in as tertenant. *Sid.* 317. 2 *Keb.* 143. But for this, vide *Cro. Car.* 295. 312. *Cro. Jac.* 506. 2 *Brown*, 145.

In ejectment, there was judgment againſt the teſtator, and a *ſci. fa.* againſt the executor, without naming him terre-tenant; and it being objected, that in ejectment the defendant is ſuppoſed to be a diſſeiſor, and that the lands deſcend to his heir at law, the plaintiff took out a new *ſcire facias*, and amended the fault. *Carth.* 2.

Judgment was for two meſſuages, and, after the year, a *ſcire facias* upon it recited a judgment of one meſſuage only; to which *nul tiel record* being pleaded, it was moved to amend it. But denied. For there may be ſuch a judgment; and this does not appear to be erroneous upon the face of it. 6 *Mod.* 310.

But if the plaintiff hath a judgment, with ſtay of execution for a year, he may, after the year, take out his execution without the *ſcire facias*, becauſe the delay is by conſent of par-

* It ſeems to have been doubted, whether a *ſci. fa.* lay to revive a judgment in ejectment after the year, becauſe by the common law it lay only in real actions; and at the time of *Weſtm.* 2. *c.* 45. which extends it to perſonal actions, the *term or poſſeſſion* was not recovered in the action of ejectment; but it ſeems now agreed, that a *ſcire facias* lies to revive the judgment in this action after the year, as well as in others. *Sid.* 351. 1 *Salk.* 258. *Ld. Ray.* 806. *Comb.* 250. 2 *Keb.* 307. *Skin.* 427.

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ties, and in favour of the defendant; and the indulgence of the plaintiff ſhall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his inſtance. *Roll. Rep.* 194. *Salk.* 258. 6 *Mod.* 288. *Barnes*, 132. 2 *Barnes*, 165, 166. 172. *Stra.* 300.

But it ſeems this delay of execution, being only the compromiſe or agreement of the parties, is never entered on the roll; and therefore, after the year, the plaintiff ought to move the court for a *ſcire facias*, leſt the execution ſhould be ſuſpended *quia erronicè* after the year, without the *ſcire facias*. *Keb.* 785. 6 *Mod.* 288. and the above authorities.

So if the defendant brings *error* after the year, after judgment given, and afterwards becomes nonſuit, the defendant in *error* may ſue out execution without a *ſcire facias*. *Ld. Raym.* 807. *Cro. El.* 416. 5 *Co.* 88.

But if there is an *injunction* out of *Chancery*, he cannot take out execution after the year, without a *ſcire facias*, becauſe the courts of law do not take notice of *Chancery injunctions*, as they do of *writs of error*; for the latter is a judicial proceeding, appearing to them upon record; whereas, an injunction is not a matter of record, ſo as the court can take notice of it. *Stra.* 301.

But in the caſe of an injunction, the party may take out his execution within the year, and continue it down by *vic. non miſit breve*, and it will be no breach of the injunction, which is only to prevent an actual execution. *Salk.* 322. *pl.* 9. 6 *Mod.* 388.

The plaintiff may enter, pending a *writ of error*, upon a judgment in ejectment, if he finds the poſſeſſion empty; for the writ of error binds the court, but not the party. But then he muſt take care that he do not enter with force. *Badger* v. *Lloyd.* *Holt* 199. *Ld. Raym.* 808.

After verdict for plaintiff, motion for leave to take out execution againſt the caſual ejector, *non obſtante* a writ of error brought by the defendant. Rule diſcharged. *Per Cur.* In caſes where the landlord is admitted to defend without the tenant, the reaſon for judgment againſt the caſual ejector, *per* ſtatute, is, that under it, after an end of the ſuit, plaintiff may obtain poſſeſſion of the premiſſes ſued for, which he could not do by virtue of a judgment againſt a perſon out of poſſeſſion. But where a writ of error is brought, there is not the leaſt reaſon to give plaintiff leave to take poſſeſſion, till after a determination

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mination in error. *Barnes*, 208. Like motion denied in *B. R. Jones* v. *Edwards*. *Stra.* 1241.

D. the landlord, was made defendant by rule, the tenant in poſſeſſion not appearing; after verdict for plaintiff, defendant, the landlord, brought a writ of error, and ſerved plaintiff's attorney with a rule, to be preſent at taxing coſts. Plaintiff ſigned no judgment on the verdict, but moved the court, producing the *poſtea*; and obtained a rule of courſe, for leave to take out execution againſt the *caſual ejector*. Defendant perceiving this, allowed and ſerved notice of his writ of error, and moved to ſtay proceedings on the judgment. *Per Cur.* The writ of error is no *ſuperſedeas* before delivery to the clerk of the errors, to be allowed*; vide *Meriton* v. *Stephens*. *Mich.* 15 *Geo.* 2. where, ſo far as execution had gone, it ſtood, and further proceedings only were ſtayed. In this caſe, the writ of *hab. fac. poſſeſſionem* was executed. No rule. *Sykes on dem. Oates and others* v. *Dawſon*. *Barnes*, 209.

Rule to ſhew cauſe why an *hab. fac. poſſeſſionem* ſhould not be ſet aſide, and poſſeſſion reſtored. Plaintiff obtained a verdict at the aſſizes. 1 *July*, defendant brought error, which was allowed 29 *Oct.* after; but entered into no recognizance, nor put in bail thereon, plaintiff not having got coſts taxed on the final judgment (without which, the meaſure or quantum of the recognizance could not be fixed). Plaintiff, for want of the recognizance required by the ſtatute, or bail within four days, took out a writ of *hab. fac. poſſ.* and by virtue thereof, on the 4 *Nov.* took poſſeſſion of the premiſſes, which the court held to be regular. Defendant ſhould have applied to ſtay execution, and then the court would have obliged plaintiff to have procured his coſts to be taxed: the writ of error is no *ſuperſedeas* without bail. A judge would have taken bail if applied to. Rule diſcharged. *Barnes*, 212.

Cauſe was tried at the ſummer aſſizes. *October* 27, after defendant allowed a writ of error, and ſerved plaintiff's attorney with notice of the allowance; the writ of error was returnable in *fifteen days of St. Martin*. Judgment was not ſigned till after the return, *viz. Dec.* 26, and then plaintiff took poſſeſſion. And on motion to ſet aſide, the court held,

* But in *B. R.* it is a *ſuperſedeas* to an execution (not begun to be executed), as ſoon as *allowed*, and without notice. *Salk.* 321. Vide 1 *Vol.* title, *Of ſuperſeding execution.*

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that the writ of *hab. fac. poſſ.* was irregular, and ordered poſſeſſion to be reſtored; plaintiff's attorney to pay coſts, and, by conſent, no action to be brought. The judgment being of *Michaelmas* term, was affected by the writ of error. *Barnes*, 260.

No new ejectment ſhall be brought by the defendant after judgment againſt him, till he has quitted the poſſeſſion, or the tenants have attorned to the plaintiff, ſo as he be in poſſeſſion, and the defendant out. *Salk.* 258.

A writ of poſſeſſion is to the following effect:

GEORGE the Third, *&c.* To the ſheriff of —— greeting. Whereas *A. B.* lately in our court, *before us* [or before our juſtices, if in *C. B.*], at *Weſtminſter*, by *bill without our writ, and by the judgment of the ſame court* [if by *original*, ſay by the judgment of the ſame court], recovered againſt *C. D.* his term yet to come of and in one *meſſuage*, &c. with the appurtenances, ſituate, lying, and being at ——— in your county, which *E. F.* on the ——— day of ——— demiſed to the ſaid *A.* to hold and enjoy to the ſaid *A.* from the ——— day of ——— then laſt paſt, until the full end and term of ——— years thence next enſuing, and fully to be compleat and ended; by virtue of which ſaid demiſe, the ſaid *A.* entered upon the ſaid tenements, with the appurtenances, and was poſſeſſed thereof, until the ſaid *C.* afterwards, to wit, on the —— day of —— in the —— year aforeſaid, with force and arms entered into the ſaid tenements, with the appurtenances, and him the ſaid *A.* from his farm aforeſaid ejected, put out, and amoved, his ſaid term therein not being expired; and him ſo ejected, put out, and amoved from his poſſeſſion of his ſaid farm, hath withheld, and ſtill doth withhold, whereof the ſaid *C.* is convicted, as appears to us upon record. Therefore, we command you, that without delay you cauſe the ſaid *A.* to have his poſſeſſion of his farm aforeſaid, yet to come of and in the tenements aforeſaid, with the appurtenances, and how you ſhall execute this our writ, make appear *to us* [or to our juſtices] at *Weſtminſter*, on, *&c.* [the return]; and have then there this writ.

Witneſs, *&c.*

For other forms, ſee the various books of entries.

The writ of poſſeſſion has relation to its *teſte*, though it be not actually ſued out till after the death of the leſſor of the

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plaintiff; yet if teſted before his death it is regular. *Burr. Rep. 4 pt.* 1971.

The words of the writ are, *quod habere facias poſſeſſionem*; ſo that there muſt be a full and actual poſſeſſion given by the ſheriff, and conſequently all power neceſſary for this end muſt be given him; and therefore if the recovery be of a houſe, the ſheriff may juſtify breaking open the door, if he be denied entrance by the tenant, becauſe the writ cannot be otherwiſe executed. 5 *Co.* 91. *b. Law of Ejectm.* 108.

The ſheriff is to give *poſſeſſion*, upon the *plaintiff's ſhewing*, and at the plaintiff's peril; who is, at his peril, to take poſſeſſion of no more than he is entitled to. Vide *Burr. Rep.* 4 *pt.* 2673.

An iſſue has been directed to try whether the ſheriff had delivered poſſeſſion properly according to the recovery. *Ibid.*

If plaintiff recovers ſeveral meſſuages in the poſſeſſion of different perſons, the ſheriff muſt go to each houſe, and deliver the poſſeſſion thereof; and this is done by turning the tenants out of each of the houſes; for the delivery of one meſſuage in the name of all, is not a good execution of the writ; becauſe the poſſeſſion of one tenant is not the poſſeſſion of another; but each hath his ſeveral poſſeſſion. *Law of Ejectm.* 108.

If the ſheriff turns out all perſons he can find in the houſe, and gives the plaintiff, as he thinks, quiet poſſeſſion; and, after the ſheriff is gone, there appears ſome perſons to be lurking in the houſe, this is no good execution; and therefore the plaintiff ſhall have a *new habere facias poſſeſſionem*; becauſe he never had execution. *Upton* v. *Wells. Leon.* 145.

If the execution goes to the ſheriff for twenty acres, the ſheriff muſt give twenty acres, according to the common eſtimation of the country where the lands are. *Roll. Rep.* 410.

If the recovery is of land, and the plaintiff demanded more than he recovered, the ſheriff uſed formerly to give poſſeſſion of one or two acres in the name of all, which the plaintiff recovered, in order to be ſafe from an action of treſpaſs, by giving that which was not recovered; but now, at this day, in the caſe of recovering leſs than was demanded, the plaintiff uſually gives the ſheriff ſecurity to indemnify him from the defendant; and then the ſheriff gives execution of all which the plaintiff demands under his judgment. *Law of Ject.* 110.

Judgment was for *one* meſſuage, and the ſheriff delivered poſſeſſion of *two* [as it was ſaid], a lath and plaiſter being run up the middle of the meſſuage, and occupied by two families, but it was held a good execution. *Anon.*

Of Execution in Ejectment.

Ejectment was for *five eighths* of a cottage, and the ſheriff gave poſſeſſion of the whole to the plaintiff, who was tenant in common. *Per Cur.* This is wrong, the writ ought to have purſued the verdict; let there be a rule upon the ſheriff and the leſſor of plaintiff, to reſtore the tenant to *three eight* parts of the premiſſes, otherwiſe he will be forced to bring another ejectment for the ſame. 3 *Wilſ.* 49.

A *moiety* may be recovered in ejectment for an *entirety*.

A rule was made for the leſſor of plaintiff and his attorney, to pay the tenant his coſts of the application, and reſtore his goods, they having entered a general judgment, and taken out a general writ, and thereby taken poſſeſſion of the whole premiſſes and removed the goods, when the defendant had obtained a rule to defend for *two thirds*. *Barnes*, 191.

A judgment irregularly obtained was ſet aſide, and the poſſeſſion given upon the execution ordered to be reſtored. But the leſſor of plaintiff (who held the poſſeſſion) abſconding, the rule became ineffectual; whereupon it was moved, on behalf of the late tenants, for a writ of reſtitution, which the court awarded accordingly. *Barnes*, 178.

In ejectment after a verdict, and writ of error allowed, if no recognizance is entered into, nor bail put in, the plaintiff may ſue out his execution. *Suppl. to* 2 *Barnes*, 30. As to *bail on error* in ejectment, *vide* the ſtat. 16, 17 *Car.* 2. *c.* 8. and 4 *Burr.* 2501. and *poſt* title *Bail in error*, where requiſite.

An *attachment* was granted abſolute in the firſt inſtance, againſt the tenant in poſſeſſion, on affidavit that he had been ſerved with a rule of court, made abſolute, for delivering up the poſſeſſion, and had refuſed ſo to do. *Davies ex dem. of Povey* v. *Doe. Eaſt.* 13 *Geo.* 3. 2 *Blackſ. Rep.* 892.

Of quieting the Plaintiff, and of relieving him when his Poſſeſſion is diſturbed.

THE writ of execution in ejectment is only returnable at the inſtance and election of the plaintiff, for the court will not direct the writ to be returned at the inſtance of the defendant; which ſeems to be left to the choice of the plaintiff, that he may take what is moſt for his advantage, in order to have the full benefit of his judgment: and the way to that is, to ſuffer him to renew the execution at his pleaſure, till a new execution be had; but he cannot renew execution, after he has once procured the writ of poſſeſſion to be returned and filed; becauſe it then appears on record, that the plaintiff hath had the benefit of his ſuit, and then to award a new execution would be *actum agere*, and conſequently ſuperfluous; and therefore the court will never oblige the ſheriff to make a return, but at the plaintiff's deſire. *Rol. Abr.* 386. 2 *Keb.* 245. *Rol. Rep.* 353. *Ld. Raym.* 252. 346. 482. 718. 725. 1072. *Carth.* 496. *Salk.* 260. *pl.* 1. 5 *Mod.* 443.

If the writ is once returned, though not filed, it ſeems, no new *habere facias* ſhall iſſue, becauſe when the return is made it becomes a record, which the court then is entitled to. 2 *Brown*, 216.

When the writ is not returned, in order for a new writ, there muſt be a ſuggeſtion, that *vicecomes non miſit breve*; but this new writ cannot iſſue, till the return of the firſt writ is out; becauſe till that return is paſt *non conſtat* to the court, but that the ſheriff may do his duty, and the plaintiff thereby have the full benefit of his judgment, and ſo no new writ neceſſary. *Palm.* 289.

The writ is not executed, nor the execution compleat, till the ſheriff and his officers are gone, and the plaintiff left in quiet poſſeſſion. If the officer is diſturbed in the execution of the writ, on affidavit thereof, the court will grant an attachment againſt the party, whether the defendant or a ſtranger, becauſe the writ is the proceſs of the court, and the diſturbance is a contempt of its authority. 6 *Mod.* 27.

But after poſſeſſion once given, and a diſturbance thereof, the law makes a difference where the plaintiff is turned out by the defendant himſelf, and where by a ſtranger: If by the defendant, and the writ not returned, the plaintiff may have a new *habere facias* or an attachment, becauſe the defendant himſelf ſhall never keep that poſſeſſion, which the plaintiff is entitled to, and has recovered by due courſe of law; but if he is turned out by a ſtranger after execution executed, the plaintiff is put to his new action upon an indictment of *forcible entry*, where

Of quieting the Plaintiff, and of relieving him when his Poſſeſſion is diſturbed.

where the force will be puniſhed, becauſe the title was never tried between the plaintiff and a ſtranger; and the ſtranger may claim the land by title paramount the plaintiff, or he may come in under him, and then the recovery and execution in the former action ought not to hinder the ſtranger from keeping that poſſeſſion which he may have a right to; and if the law were otherwiſe, a plaintiff, by virtue of an *habere facias*, might turn out his own tenant, who came in after execution executed, whereas the poſſeſſion was given him againſt the defendant only, and not againſt others not party to the ſuit. *Ratcliff* v. *Tate*. *Keb.* 479. 1 *Salk.* 321.

In the caſe of *Fortune* and *Johnſon*, on motion for an attachment againſt *Johnſon*, for ejecting the plaintiff, who had been put into poſſeſſion by an *habere facias*, the court made no rule, becauſe it appeared that *Johnſon* claimed under an elder judgment, and it was title againſt title, and therefore left them to take their courſe at law. *Style*, 318.

The plaintiff had judgment, but, by agreement afterwards, the defendant was to hold for the reſidue of his term, and accordingly held for ſome time; then the plaintiff took out an *habere facias*, and executed it: upon which the defendant moved for reſtitution on the agreement, which the court refuſed, and left him to his action on the agreement, for the judgment was ruled abſolutely. But if the judgment had been with a *ceſſet executio* till ſuch a time, there if the plaintiff takes out execution within the time, the defendant ſhall have reſtitution, becauſe the judgment was entered with the limitation. *Style*, 408. *Law of Eject.* 113.

But quære, how does this appear to the court, ſince it ſeems a *ceſſat executio* is never entered on the roll? The difference ſeems to be between a judgment *by confeſſion*, and *on verdict*, where the former is given with a *ceſſat executio*; and there, if the execution is taken out contrary to the agreement, the court will ſet it aſide, and puniſh the attorney: but where judgment is given on *verdict*, the verdict is the foot and ground of the judgment, and the court will not take notice of agreements between the parties, but leave them to their remedy.

Of

Of bringing a new or ſecond EJECTMENT.

ONE great advantage attending this action is, that a man may have a remedy *toties quoties*, in being allowed to bring as many ejectments as he pleaſes [10 *Mod.* 1.], which has ſometimes proved a great miſchief, but is ſtill without remedy; for though it has ſometimes been attempted in Chancery, after three or four ejectments, by a *bill of peace* to eſtabliſh the prevailing party's title, yet it hath always been denied to alter the courſe of law, for that every *termor* may have an ejectment, and every ejectment ſuppoſes a new demiſe, and the *coſts* in ejectment are a recompence for the trouble and expence to which the poſſeſſor is put. But where the ſuit begins in *Chancery* for relief touching pretended incumbrances on the title of lands, and the court has ordered the defendant to purſue an ejectment at law, there, after one or two ejectments tried, and the right ſettled to the ſatisfaction of the court, the court hath ordered a *perpetual injunction* againſt the defendant, becauſe there the ſuit is firſt attached in that court, and never began at law; and ſuch precedent incumbrances appearing to be fraudulent, and inequitable againſt the poſſeſſion, it is within the compaſs of the court to relieve againſt it.

Formerly if one had a verdict in ejectment, and coſts taxed, and an attachment iſſued for the nonpayment of thoſe coſts, the defendant ſhould not have an ejectment in the ſame court againſt the plaintiff till thoſe coſts were paid, but he might proceed in another court; and the reaſon was, becauſe the court would have obedience paid to their rules; but another court could not take cognizance of the rules of a diſtinct court. *Sid.* 279. 8 *Mod.* 225. *Stra.* 548. 554. 681. 2 *Stra.* 1152.

But where *H.* brought an ejectment in *C. B.* and at the aſſizes was nonſuited, and coſts were taxed on the nonſuit, and then he brought a new ejectment in *C. B.* and upon a rule being there made to ſtay proceedings till the coſts of the firſt nonſuit were paid, he brought an ejectment in *B. R.* that court ſtayed proceedings there alſo, upon producing the rule of the court of *C. B.* and made a like rule there. 2 *Barnes*, 107. 1 *Salk.* 255.

Now all the courts conſider a former *ejectment* in another court, as one and the ſame court, and will ſtay proceedings in a ſecond, till the coſts of a former are paid. *Barnes*, 133. 2 *Blackſ. Rep* 1158.

No new ejectment ſhall be brought by the defendant after recovery againſt him, till he has quitted the poſſeſſion, or the tenants have attorned to the plaintiff; ſo that he be in poſſeſſion, and the defendant not. *Salk.* 258. *pl.* 12.

Of bringing a new or ſecond EJECTMENT.

The court would not ſtay proceedings in one ejectment till the event of another was determined. *Barn. K. B.* 47.

But procedings in a ſecond ejectment were ſtayed till the ſpecial verdict in the former was determined. *And.* 298. 2 *Stra.* 1105.

F. obtained judgment on a verdict on his demiſe againſt lady *G.* Upon this ſhe brought a writ of error, and pending the ſame, delivered a declaration in ejectment to the tenants in poſſeſſion upon her own demiſe. And now the plaintiff moved for the common rule, and it was denied. For *per Holt*, no new ejectment ſhall be brought by defendant, after recovery againſt him, till he has quitted the poſſeſſion, or the tenant has attorned to the plaintiff. For if the plaintiff gets judgment in this laſt ejectment, and the firſt judgment is affirmed, then he renders it needleſs and ineffectual by this ruling judgment, upon which he takes out execution to recover his poſſeſſion. The rule for judgment againſt the caſual ejector is in the power of the court, upon what terms the court thinks fit. My lady muſt ſhew us a different title, or we will not grant the rule.

The ſame thing was done in another caſe, *Hil.* 2 *Ann. B. R.* where the defendant in ejectment, pending a writ of error, delivered a new declaration in ejectment, and the court was moved that the coſts might be firſt paid. The court thought the payment of coſts ſuſpended by the writ of error, but ſtayed all things for the reaſons before given.

Of recovering the MESNE PROFITS.

BEFORE the time of *Hen.* 7. plaintiffs in ejectment did not recover the term; but until about that time the *meſne profits* accruing to the *ejector*, were the meaſure of the damages given the *ejected*. So that by the old law and practice in ejectment, the plaintiff recovered nothing but damages, no term was recovered; but when it became eſtabliſhed that the term ſhould be recovered, the ejectment was put into the form of a *real action*; the proceeding was *in rem*, and the thing itſelf; the term only then was recovered, and nominal damages, but not the *meſne profits*; whereupon a mode of recovering the *meſne profits* [after the ejectment had been tried, and the plaintiff had recovered poſſeſſion] in an action of *treſpaſs*, was introduced, and grafted upon the preſent fiction in ejectment; and the action of *treſpaſs* for the *meſne profits* is put in the place of the ejectment at common law, which was a true, and not a fictitious action, and nothing more than an action of treſpaſs. Vide 3 *Wilſ.* 120. and *Aſlin* v. *Parker*. *Burr.* 4 *pt.* 688.

Actions for *meſne profits* tend to create double expence; the plaintiff ſhould be ready at the trial of ejectment to prove his damages. *Barnes*, 87.

It was ſettled by all the judges in *Aſlin* v. *Parker*, 32 *Geo.* 2. on a caſe reſerved, that in treſpaſs againſt the tenant in poſſeſſion for *meſne profits*, *either by the leſſor or the nominal plaintiff*, after a recovery in ejectment, the plaintiff need not prove a title; but it is ſufficient to produce the judgment in ejectment, and the writ of poſſeſſion executed, and to prove the value of the profits, and thereupon he ſhall recover from the time of the demiſe laid in the declaration. *Burr. Rep.* 4 *pt.* 668. *Barnes*, 472.

But where the judgment was againſt the caſual ejector, and no rule entered into, it was held that the leſſor cannot maintain *treſpaſs for the meſne profits* without an actual entry—but *aliter* where the judgment is againſt the tenant in poſſeſſion, and he entered into a rule; for then he is eſtopped. *Oct. Stra.* 5.

In caſe the plaintiff can prove his title accrued before the time of the *demiſe*, and prove the defendant to have been longer in poſſeſſion, he ſhall recover antecedent profits; but then the defendant may controvert the title, which he cannot if the plaintiff goes for no longer time than is contained in the demiſe: becauſe, being tenant in poſſeſſion, he muſt have been ſerved with the declaration, and therefore the record is againſt him concluſive evidence of the title. But againſt a precedent occupier, the record is no evidence, and therefore againſt ſuch a one, it is neceſſary for the plaintiff to prove his title, and alſo to prove an actual entry: for treſpaſs, being a poſſeſſory action, connot be maintained without it. *Vide Bull. Ni. Pri.* 87.

Of recovering the MESNE PROFITS.

But *note:* Should the plaintiff in an action of treſpaſs for *meſne profits* go back for damages till the time his title accrued, and the defendant have been in poſſeſſion, he may protect himſelf by the ſtatute of limitations, from all damages, but for the laſt *ſix years*. *Bull. Ni. Pri.* 88.

An action for meſne profits may be brought in the name of either the *nominal* plaintiff, or his *leſſor*, againſt the tenant in poſſeſſion; whether he be made party to the ejectment, or ſuffers judgment to go by default.

If the action be brought, after judgment by default, againſt the *caſual ejector*, it is uſual for the plaintiff to recover the coſts of the ejectment, as well as the meſne profits. *Bull. Ni. Pr.* 88.

And in caſe the action be brought by the *nominal plaintiff* in ejectment, the court on application will ſtay the proceedings therein till ſecurity is given for the coſts. Agreed. *Ibid.*

If the action for *meſne profits* is brought in the name of the *nominal* plaintiff, you cannot go back beyond the time of the demiſe laid in the declaration, whether the tenant has ſuffered judgment by default, or defended the ejectment, and judgment has been had againſt him, and writ of poſſeſſion executed.—But if the action is brought by the *leſſor* himſelf, he may, in either caſe, go back beyond the time of the demiſe laid in the declaration, if he can prove his title beyond ſuch time: but even in that caſe, upon the plea of the ſtatute of limitations, he cannot recover beyond ſix years.

If one tenant *in common* recovers in ejectment againſt another, he may have treſpaſs for the *meſne profits*. 3 *Wilſ.* 118.

The defendant cannot pay money into court in an action for meſne profits after recovery in ejectment. 2 *Wiſ.* 115.

In an action for *meſne profits*, the parcels muſt be mentioned, or defendant may plead the common bar.

In actions for *meſne profits*, nothing but the judgment in ejectment, and execution thereupon, and the value of the *meſne profits*, can be given in evidence, and not the title; otherwiſe trials would be infinite.

If in ejectment there is a verdict for plaintiff, and defendant bring error, and enters into recognizance to pay coſts in caſe of *nonſuit*, &c. purſuant to the *ſtatute of Charles the Second*; and he be nonſuited, *&c.* defendant in error need not bring a *ſcire facias*, or *debt* on the recognizance, but may ſue out an *elegit*, or *writ of enquiry*, to recover the *meſne profits* ſince the firſt judgment in ejectment. *Short* v. *Heath*, *Mich.* 12 *Geo.* 2.

Of

Of the Action of Replevin.

GOODS, *&c.* are only repleviſable when they have been taken by way of *diſtreſs*; and therefore replevin is a remedy grounded upon a *diſtreſs*, being a re-deliverance of the goods or cattle diſtrained to the firſt poſſeſſor, on ſecurity given by him to try the right, and to re deliver the things diſtrained, if judgment be given againſt him. *Co. Lit.* 145.

The action of *replevin* is of two ſorts: 1. In the *detinet*. 2. In the *detinuit*; and may be brought in any caſe where a man has his goods or cattle taken from him by another, by way of *diſtreſs*.

Where the party has had his goods re-delivered to him by the ſheriff upon a *writ* of replevin, or upon a *plaint* levied before him [which, by the ſtatute of *Marlbridge*, 52 *Hen.* 3. the ſheriff may take out of the county court, and make replevin preſently], the action is in the *detinuit*, *wherefore he detained the goods*, &c. but where the ſheriff has not made ſuch replevin, but the diſtrainer ſtill keeps poſſeſſion, the action is in the *detinet*; *wherefore he detains the goods*, &c. However, of late years, no action has been brought in the *detinet*, though there is much curious learning in the old books concerning it.

The advantage the plaintiff has in bringing an action of replevin in the *detinet*, inſtead of an action of treſpaſs *de bonis aſportatis*, is, that he can oblige the defendant to re-deliver the goods to him immediately, in caſe upon making his avowry they appear to be repleviſable; but as he may more ſpeedily have them delivered immediately after they are diſtrained, by application to the ſheriff, the action in the *detinet* has fallen into diſuſe, and is never brought, unleſs the diſtrainor has eſloined the goods, ſo that the ſheriff cannot get at them to make replevin; and then it may be brought in the *detinet*: Whereupon, after avowry made, the plaintiff may pray that the defendant gage deliverance; or he may, upon the return of *elongavit* to the *pluries writ of replevin*, have a writ to the ſheriff, commanding him to take other beaſts, *&c.* of the defendants in *withernam*; but then, if the defendant, before the return of the *withernam*, appears to the writ of replevin, and offers to plead *non cepit*, it ſhall ſtay the *withernam*; for the defendant ſhall not be concluded by the return of the *elongavit*, becauſe the ſheriff can make no other return, where he cannot find the thing to be replevied.

The word *withernam*, is a term, which ſignifies a ſecond or reciprocal diſtreſs, in lieu of the firſt, which was eſloined. The writ of *capias in withernam*, is a writ therefore to the ſheriff, commanding him to take other goods, *&c.* of the diſtrainors, in

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in lieu of the diſtreſs formerly taken and eſloined or withheld from the owner. So that here is now diſtreſs againſt diſtreſs, one being taken to anſwer the other by way of repriſal, and as a puniſhment for the illegal behaviour of the original diſtrainor. For which reaſon, goods taken in *withernam* cannot be replevied till the original diſtreſs is forthcoming. Ld. *Raym.* 475.

If the perſon taking the goods claims property in them before the ſheriff, he cannot make replevin of them: But then the plaintiff may ſue out a writ *de proprietate probanda*, upon which the ſheriff muſt have an inqueſt of office; and if, upon ſuch inquiſition, the property is found in the plaintiff, the ſheriff ſhall make replevin; otherwiſe not. But though the property is not found in the plaintiff, he is not concluded, for he may ſtill have his action of replevin in the *detinet*, or of treſpaſs. But if in an action of replevin the defendant *plead property*, and it be found for him, the plaintiff is thereby concluded.

Therefore, he that brings replevin muſt have an abſolute, or at leaſt a ſpecial, property in the thing diſtrained; and therefore, ſeveral men cannot join in a replevin, unleſs they be joint-tenants, or tenants in common. *Co. Lit.* 145.

Executors may have a replevin of a taking in *vita teſtatoris*; for this affirms the property to remain. *Bro. Rep.* 59. *Sid.* 82.

So if the cattle or goods of a feme ſole be taken, and ſhe afterwards intermarry, the huſband alone may have replevin; but if they join, and there be a verdict for them, judgment will not be arreſted, becauſe the court will preſume them jointly intereſted (as they may, if a diſtreſs be taken of goods, of which a man and woman were joint-tenants, and afterwards intermarry): the avowry admitting the property to be in the manner it is laid. Vide *Bull. Ni. Pri.* 53.

When an act of parliament orders a diſtreſs and ſale of goods, this is in nature of an execution, and *replevin* does not lie.

Where Replevin may be brought.

THE action of replevin may be brought either in *B. R.* or *C. B.* by writ made returnable therein; but the action is moſt uſually commenced in the county court, though by ſpecial cuſtom a replevin may be brought in an *hundred* court, *&c.* or other court of record, that may hold plea thereof. Vide *Salk.* 580. 2 *Inſtit.* 139. 3 *Mod.* 56, *&c.*

A replevin lies two ways in a *county court*, by *writ* and by *plaint*. However, it is ſeldom brought by *writ* there, becauſe the plaintiff may have his goods or cattle reſtored to him more ſpeedily, by levying his *plaint* there, according to the ſtatute of *Marlbridge*, 52 *Hen.* 3. *c.* 21. which gives a replevin by plaint, either in or out of court; till which ſtatute, the ſheriff could not replevy by *plaint*. For, at common law, the ſheriff could replevy by writ only, and that in his county court. Vide Ld. *Raym.* 219.

If the replevin is *by writ* there, the writ iſſues out of *Chancery*, and is in the nature of a *juſticies*. 2 *Inſtit.* 240.

And if he does not return it, or does nothing upon it, the plaintiff may have an *alias*, in which is inſerted uſually this clauſe, that he make replevin, *vel cauſam nobis ſignificet.* *F. N. B.* 68. *e.* And after that a *pluries*.

If the ſheriff makes replevin, he need not return the writ; but if he does not, he ought to return the cauſe. 2 *H.* 7. 5. *b.*

And if he does not, an attachment lies againſt him to the coroners, commanding them to attach the ſheriff for his contempt, and in the interim make replevin. *Reg.* 81.

To any of theſe writs, the ſheriff cannot return a *mandavi ballivo*, &c. For by *Weſtm.* 1. 17. the ſheriff ought immediately to enter the franchiſe, and make deliverance. *F. N. B.* 58. *f.*

If he does not replevy, and makes any other return, the plaintiff ſhall have a *capias in withernam*; and after that, *an alias*, and a *pluries capias in withernam.*

But as replevin by *plaint* is the moſt uſual and expeditious, I ſhall ſhew how to proceed therein.

Upon *plaint* made to the ſheriff, of goods or cattle diſtrained, he, by *parol* or precept, may, by his bailiff, replevy them. 2 *Inſtit.* 139. *F. N. B.* 69. *e.* *Per Lit.* 9 *Edw.* 4. 48. *b.*

And it is not neceſſary for the plaintiff to ſtay till the county court is held, before he makes plaint, if the plaint is afterwards entered there. *Ibid.* And the ſheriff may make deliverance, though the goods or cattle are above the value of 40*s.*

By ſtat. 1 & 2 *P. & M. c.* 12. *ſect.* 3. "For the more ſpeedy delivery of cattle diſtrained, the ſheriff muſt appoint four

Where Replevin may be brought.

deputies at leaſt in his bailiwick, dwelling not above twelve miles one from the other, to make replevins; who have authority in his name, to make replevins and deliverances, *&c.*"

To impound cattle in another county, does not make the diſtrainor a *treſpaſſer*, though it may ſubject him to a penalty on this ſtatute 1 & 2 *P. & M.*

Though the ſheriff may grant *replevins* by *plaint*, and may proceed thereon in the county court, yet if any thing touching the *freehold* come in queſtion, or *ancient demeſne* be pleaded, the ſheriff can proceed no further: nor can any ſuch proceedings be carried on in the hundred court, court-baron, or any other court claiming a juriſdiction herein by preſcription. 4 *Hen.* 6. 30. 2 *Hen.* 7. 6. *Co. Lit.* 145.

So when the king is party, or the taking is in right of the crown, the ſheriff is to ſurceaſe. *Bro. Repl. pl.* 3. *Brown*, 33.

Of finding Pledges in Replevin.

UPON making replevin, the ſheriff ought to take two kinds of *pledges*—viz. *pledges of proſecution* by the common law, and pledges *pro retorno habendo*, according to the ſtatute *Weſtm.* 2. *c.* 2. by which it is provided, "That ſheriffs or bailiffs from thenceforth ſhall not only receive of the plaintiff, pledges for the purſuing of the ſuit, before they make deliverance of the diſtreſs, but alſo for the return of the beaſts, if return be awarded; and if any take pledges otherwiſe, he ſhall anſwer for the price of the beaſts; and the lord that diſtrains ſhall have his recovery by writ, that he ſhall reſtore to him ſo many beaſts or cattle; and if the bailiff be not able to reſtore, his ſuperior ſhall reſtore."

The pledges for proſecution in this, as in all other actions, are now become *nominal perſons*; but the pledges *pro retorno habendo*, ought to be real and reſponſible perſons; for an action lies againſt the ſheriff if he omits to take theſe pledges, or if he takes thoſe that are inſufficient; for the party may have a *ſcire facias* againſt the pledges, where the ſuit is in any court of record; and if it is in any court not of record, as the county court, hundred court, *&c.* he may have a *precept* in the nature of a *ſcire facias* againſt theſe pledges, though not a *ſcire facias*: becauſe a *ſcire facias* ought to be grounded on a record. *Ld. Raym.* 278. *Comb.* 1, 2. 593.

But as ſheriffs became remiſs in their duty, and often neglected taking theſe pledges *pro retorno habendo*; or if any were taken, for the moſt part they were found to be indigent and irreſponſible people; the ſtat. of 11 *Geo.* 2. *c.* 19. *ſ.* 23. for the better ſecuring the payment of rents, and preventing frauds by tenants, enacts, "That to prevent vexatious replevins of diſtreſſes taken *for rent*, all ſheriffs and other officers having authority to grant replevins, may and ſhall, in every replevin of a diſtreſs for rent, take, in their own names, from the plaintiff, and two reſponſible perſons as ſureties, a bond in double the value of the goods diſtrained [ſuch value to be aſcertained by the oath of one or more credible witneſs or witneſſes not intereſted in the goods or diſtreſs, which oath the perſon granting ſuch replevin is hereby authorized and required to adminiſter], and conditioned for proſecuting the ſuit with effect and without delay, and for duly returning the goods and chattels diſtrained, in caſe a return ſhall be awarded before any deliverance be made of the diſtreſs; and that ſuch ſheriff, or other officer as aforeſaid, taking any ſuch bond, ſhall, at the requeſt and coſts of the avowant, or perſon making conuzance, aſſign ſuch bond to the avowant of

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" or perſon aforeſaid, by indorſing the ſame, and atteſting it " under his hand and ſeal, in the preſence of two or more " credible witneſſes; which may be done without any ſtamp, " provided the aſſignment, ſo indorſed, be duly ſtamped before " any action be brought thereon; and if the bond ſo taken and " aſſigned be forfeited, the avowant, or the perſon making " conuzance, may bring an action, and recover thereupon in " his own name; and the court, where ſuch action ſhall be " brought, may, by a rule of the ſame court, give ſuch re- " lief to the parties, upon ſuch bond, as may be agreeable to " juſtice and reaſon; and ſuch rule ſhall have the nature and " effect of a defeazance to ſuch bond."

An action on the caſe was brought againſt a ſheriff for taking inſufficient pledges upon a replevin; to which he pleaded not guilty; and a verdict being found againſt him, and a judgment given thereon in the court of *C. B.* on a writ of error in *B. R.* it was objected, 1. That an action on the caſe was not the proper remedy; 2. Suppoſing ſuch action lay, that there ought to have been a *ſcire facias* firſt ſued out againſt the pledges. As to the firſt, the court held, that the party diſtraining has, by the ſtat. *Weſtm.* 2. an intereſt in the pledges; and if the ſheriff omits to take ſuch, or, which is the ſame thing, takes inſufficient ones, he is aggrieved, and conſequently entitled to his action.—2*dly*, That though a *ſcire facias* may be brought againſt the pledges, yet it does not follow from thence, that an action does not lie againſt the ſheriff; and ſuch *ſcire facias*, which is only to certify the ſufficiency of the pledges, is the leſs neceſſary in the preſent caſe, ſuch inſufficiency being ſet forth in the declaration, and found by the verdict. *Hil.* 13 *Geo.* 2. *Pattiſon and Prowſe.*

In ſuch action againſt the ſheriff, ſome evidence muſt be given by the plaintiff of the inſufficiency of the pledges or ſureties; but very ſlight evidence is ſufficient to throw the proof on the ſheriff, for the ſureties are known to him, and he is to take care that they are ſufficient. *Saunders* v. *Darling and another*, *Sittings at Weſtm. Tr.* 10 *Geo.* 3.

In *Richards* v. *Acton*. *Tr.* 18 *Geo.* 3. *C. B.* It was held that the high ſheriff, and under-ſheriff, and replevin clerk, are all anſwerable to the defendant in replevin for the ſufficiency of the pledges *de retorno habendo*. 2 *Blackſ. Rep.* 1220.

In the foregoing caſe of *Richards and Acton*, 2 *Blackſ. Rep.* 1220. the diſtreſs was for rent, and on replevin brought, the defendant had a verdict, with damages and coſts to 57*l.* 15*s.* and to the writ of *retorno habendo* thereupon ſued out,

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the ſheriff returned an eſloignment; on which application was made to the *replevin clerk* for the names of the pledges taken, according to the ſtatutes *Weſtm.* 2. and 11 *Geo.* 2. in order to call upon them; but he from time to time evaded and delayed ſo doing. Whereupon, on application, the court made a rule, on the *replevin clerk*, the *under-ſheriff*, and *county clerk*, to diſcover the names of the *pledges* taken upon granting the replevin; and to ſhew cauſe why they ſhould not pay the defendant the 57*l.* 15*s.* recovered, together with the coſts of the application. The *replevin clerk* ſhewed no cauſe, but made affidavit of his inability, through illneſs, to do buſineſs; the *under-ſheriff* and *county clerk* ſhewed for cauſe, that they were entirely ignorant of the matter, having nothing to do with the *replevin clerk*, who was appointed by the ſheriff under the ſtat. 1 *and* 2 *Philip and Mary.* The court then enlarged the rule till the laſt day but one of the term, and ordered the high ſheriff to be added. When it was held, that the *ſheriff*, *under-ſheriff*, *and replevin clerk*, are all anſwerable to the defendant for the pledges. They therefore diſcharged the rule againſt the *county clerk*; but with regard to the other three, they made the rule abſolute.

In *C. B.* defendant moved to amend his return of *reſalı* filed in *Mich. term*, by adding pledges. In the replevin cauſe, judgment went for defendant in the plaint, for want of plaintiff's declaring above; and a *return. habend.* was iſſued, and an *elong.* returned thereon. And now this action was brought againſt the ſheriff for not taking pledges: defendant pleaded, that he took a replevin bond, whereto plaintiff demurred. *Per Cur.* The pledges ought to be recorded in the court below, no affidavit is produced of that fact, here is nothing to amend by. *Rule diſcharged. Barnes*, 8.

Of

Of making Replevin.

UPON *plaint* being made, and pledges found; or in caſe the goods, *&c.* have been diſtrained for *rent*, a replevin-bond having been taken, according to the ſtat. of 11 *Geo.* 2. *c.* 19. The ſheriff, or one of his deputies, by the ſtat. 1 & 2 *P. & M.* *c.* 12. is to make replevin of the goods or cattle diſtrained, which is done by granting a warrant, which is to the following effect:

"*Bucks*, to wit. *A. B.* Eſq; ſheriff of the county aforeſaid: To the bailiff of the hundred of *Deſborough*, in the ſaid county; and alſo to *John Thomas*, and *William Jones*, my bailiffs, and to every of them, greeting. For as much as *C. D.* hath found me ſufficient ſecurity as well to proſecute a ſuit againſt *E. F.* and *G. H.* for taking and unjuſtly detaining of his cattle, goods and chattels, to wit, *one mare and four colts*, which the ſaid *E. F.* and *G. H.* have taken and unjuſtly detained, as is alledged; as alſo for return thereof, if a return thereof ſhould be adjudged: therefore I command you, and every of you, jointly and ſeverally, that on the behalf of our lord the king, you replevy, and cauſe to be delivered to the aforeſaid *C. D.* his cattle, goods and chattels aforeſaid; and that the aforeſaid *E. F.* and *G. H.* give, or cauſe to be given, ſufficient pledges, ſo that they may be and appear at the next county court to be holden at *Ayleſbury*, in and for the county of *Bucks* aforeſaid, to anſwer the aforeſaid *C. D.* in a plea of taking, and unjuſtly detaining, of his cattle, goods and chattels aforeſaid; and in what manner you ſhall execute this precept certify to me at the ſaid next county court, to be held at the time and place aforeſaid, under the peril incumbent. Given under the ſeal of my office this day in the twentieth year of the reign of our ſovereign lord *George* the Third, king of *Great Britain*, *&c.* and in the year of our Lord 1780."

By *John Dixon*,
One of the replevinors appointed by the ſaid ſheriff for the ſaid county of *Bucks*.

In a replevin in the county court without writ, if the bailiff return to the ſheriff that he cannot have view of the cattle, *&c.* diſtrained, to deliver them, the ſheriff, by inqueſt of office, ought to enquire into the truth thereof; and if it be found by a jury, that the cattle are *eloigned*, the ſheriff, in his county court, may award a *withernam* to take defendant's cattle. And if

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he will not award a *withernam*, then the plaintiff may have a writ out of *Chancery*, directed to the ſheriff, rehearſing the whole matter, and commanding him to award a *withernam*; and if the ſheriff then neglects, the plaintiff may have an *alias* and *pluries*, and after that an *attachment* againſt the ſheriff. *F. N. B.* 158.

But if the replevin be in a ſuperior court by writ, and the ſheriff returns an *elongata*, then the plaintiff muſt ſue a *capias in withernam* out of the ſuperior court, and purſue ſuch writ there. It has been ſaid before, that a *capias in withernam*, is a term which ſignifies a reciprocal diſtreſs, in lieu of the firſt which is eloigned; and is a command to the ſheriff, to take other goods of the diſtrainor in lieu of the diſtreſs by him taken and eloigned, or withheld from the owner. So that there is then diſtreſs againſt diſtreſs; one being taken to anſwer the other, by way of repriſal, and as a puniſhment for the illegal behaviour of the original diſtrainor: for which reaſon, goods taken *in withernam* cannot be replevied till the original diſtreſs is forthcoming.

If a ſheriff, in making replevin, be ſhewn a ſtranger's cattle or goods, and he takes them, treſpaſs lies againſt him, for otherwiſe there would be no remedy: for being a ſtranger, he cannot have a writ *de proprietate probanda*. And were he not entitled to this remedy, it would be in the power of the ſheriff to ſtrip a man's houſe of his goods. 1 *Roll. Abr.* 552. *Cro. Rep.* 596. But *Kelway* ſeems to hold, that the action lies more properly againſt the perſon who ſhews the goods. *Kelw.* 119.

If the ſheriff comes to make replevin of beaſts impounded in another man's ſoil, and the place be incloſed, but has a gate open to the incloſure, he cannot break the incloſure and enter, where he may enter by the open gate. But if the owner hinders him, ſo that he cannot go by the open gate for fear of death, he may break the incloſure, and enter there. 20 *Hen.* 6. 28. 2 *Roll. Abr.* 552.

In all caſes of miſbehaviour by the ſheriff, or other officers, in relation to *replevins*, they are ſubject to the king's ſuperior courts, and puniſhable by *attachment* for ſuch miſbehaviour.

Of

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THE replevin remains before the ſheriff, *&c.* though the goods and chattels, *&c.* diſtrained are above the value of 40*s.* for the replevin, *alias* and *pluries*, are all vicontiel writs, 2 *H.* 7. 5. *b.* and the ſuit may be determined in ſuch inferior court; but the ſuit may be removed by either of the parties into the courts of *B. R.* or *C. B.* to be there determined.

And it may be removed by the plaintiff without cauſe. *F. N. B.* 69. *m.*

And by the defendant with cauſe, but not without cauſe. *F. N. B.* 70. *a.* This, however, is otherwiſe now, for either party may remove it.

The method to be purſued in moving it, depends entirely on the manner in which the ſuit was commenced below.

For if replevin be in the county court by *writ*, it muſt be removed into *B. R.* or *C. B.* by *pone*. *F. N. B.* 69. *m.*

If in the county court by *plaint*, it is removed by writ of *recordari facias loquelam* [commonly called a *refalo*, for the ſake of brevity]. *F. N. B.* 71. *a.*

If replevin is in a court of record, that may hold plea in replevin, it muſt be removed by writ of *certiorari*, and can be removed in no other manner. 3 *Mod.* 56.—*Per King* ch. juſt. *Hil.* 3 *Geo.* 1. For a *refalo* does not go to a court of record, becauſe there the ſuit is already recorded.

And if the plaint is in the court of another lord, it may be removed into *B. R.* or *C. B.* by *recordari* to the ſheriff, commanding him *quod accedas ad curiam & in plena curia ill' recordari facias*, &c. *F. N. B.* 70. *b.*

But it is ſaid, that a replevin ſhall not be removed out of a court, which is not the king's court, without cauſe, neither by the plaintiff, nor by the defendant. *Reg.* 85. *b.* 2 *Inſt.* 339. for the prejudice that may come thereby to the lord.

All the above writs, to remove the ſuit from the inferior courts into *B. R.* or *C. B.* are in their nature *original writs*, and iſſue out of *Chancery*. But as the ſuit is moſt uſually commenced in the *county court* by *plaint*, and ſeldom or ever at this day by *writ*, I ſhall only ſhew the method of removing it when by *plaint*.

In order to remove it, therefore, the party makes out a *præcipe* to the *curſitor* of the proper county, in the following form:

Bucks, to wit, *Refalo* for [either the plaintiff or defendant, naming him], of a plaint between *C. D.* and *E. F.* and *G. H.*

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G. H. for taking and unjuſtly detaining the cattle, goods, and chattels of the ſaid *C.*

Returnable from *Eaſter* in fifteen days.

Upon delivery of this *præcipe* to the *curſitor*, he makes out the writ, which muſt be carried to the under-ſheriff of the county, who returns it of courſe.

The *reſalo* is to the following effect:

GEORGE the Third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, &c. To the ſheriff of *Buckinghamſhire*, greeting. We command you, that in your full county you cauſe the plaint to be recorded, which is in the ſame county, without our writ, between *C. D.* and *E. F.* and *G. H.* of the cattle, goods, and chattels of the ſaid *C.* taken and unjuſtly detained, as it is ſaid; and that you have the ſaid record *before us* [or if in *C. B.* before our juſtices] at *Weſtminſter*, from *Eaſter* day, in fifteen days, under your ſeal, and the ſeals of four lawful knights of the ſame county, of ſuch as ſhall be preſent at the ſaid record; and that you prefix the ſame day to the parties, that then they may be there ready to proceed in the ſaid plaint as ſhall be juſt; and have you there the names of the ſaid four knights, and this writ. Witneſs ourſelves at *Weſtminſter*, the —— day of ——— in the twentieth year of our reign.

Let this writ be executed if the ſaid *C.* deſires it, otherwiſe not.

The return thereof is as follows:

By virtue of this writ to me directed, in my full county held at *Ayleſbury*, the —— day ——— in the twentieth year of the reign of our ſovereign lord *George* the Third, king of *Great Britain*, *France*, and *Ireland*, &c. I cauſed the plaint to be recorded, which is in the ſame county, without the writ of our ſaid lord the king, between *C. D.* and *E. F.* and *G. H.* of the cattle, goods, and chattels of the ſaid *C.* taken and unjuſtly detained, as it is ſaid, which ſaid plaint appears in a certain ſchedule to this writ annexed; and I have the ſaid record before our ſaid lord the king [or the juſtices of our ſaid lord the king] at *Weſtminſter*, on the day within written,

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ten, under my ſeal, and the ſeals of four lawful knights of the ſame county, who were preſent at the ſaid record; and I have prefixed the ſame day to the parties, that they may be then and there ready to proceed in the ſaid plaint, as ſhall be juſt.

The anſwer of *A. B.* Eſq; ſheriff.

The ſchedule to be annexed to the writ and return.

At my full court held at *Ayleſbury*, in the county of *Bucks*, the ——— day of ——— in the twentieth year of the reign of our ſovereign lord *George* the Third, *&c.* before *L. M. N. O. P. Q.* and *R. S.* four lawful knights of the ſame county (amongſt other things), it is thus contained: *C. D.* complains againſt *E. F.* and *G. H.* of a plea of taking and unjuſtly detaining of his cattle, goods, and chattels, to wit, one mare and four colts of the ſaid *C.* and at my full court held at *Ayleſbury*, in the county aforeſaid, the ——— day of ——— laſt, before *S. T. J. M. N. U.* and *W. X.* four lawful knights of the ſaid county, I cauſed the ſaid plaint between the parties aforeſaid to be recorded as the writ hereunto annexed requires. In teſtimony whereof, as well I the ſaid ſheriff, as the ſaid *S. T. J. M. N. U.* and *W. X.* who were preſent at the ſaid record, have cauſed our ſeals to be hereunto put, the day and year and place above mentioned.

A. B. Eſq; Sheriff.

If the ſheriff returns the *recordari*, *tarde*, the party ſhall have an *alias*, &c. *F. N. B.* 70. *b.*

By the *recordari* nothing is removed but the *plaint*, even though iſſue ſhould be joined below. *F. N. B.* 71. *a.*

And the plaint may be removed, though the plaintiff has diſcontinued there. *Ibid.*

When the plaint is removed into *B. R.* or *C. B.* the plaintiff muſt declare there *de novo*, otherwiſe the defendant may ſue out a writ *de retorno habendo*. *F. N. B.* 71. *a.*

And the plaint, when removed, is filed with the *filazer* of the county in *B. R.* as it is alſo when removed into *C. B* *.

* But *note*: Upon removal of any other actions, except *replevin*, into *C. B.* the writ and proceedings are filed with the *prothonotary* there.

If

Of removing the Suit from the COUNTY-COURT, &c. into the Courts of *B. R.* or *C. B.*

If the plaintiff removes the plaint, he muſt file the *reſalo*, &c. with the *filazer*, and ſee if the defendant has appeared; and if he has not appeared, he muſt give him a rule to appear; and upon non-appearance thereto, the plaintiff muſt ſue out a *pone*; and upon like non-appearance thereto, he may ſue out *diſtringas ad infinitum*, till he does appear—And then the plaintiff declares.

But if the defendant removes it, he muſt file the *reſalo* and return thereto with the *filazer*; and having entered an appearance, he muſt then give a rule for the plaintiff to declare; and for want of a declaration, when the rule is out, he may ſign a *non-pros* for not declaring, and immediately ſue out a writ of *retorno habendo*.

The defendant's attorney, upon filing the *reſalo*, which he ought to do on the return day, or at leaſt on the appearance day of the return, ought to give the plaintiff's attorney notice thereof, and call upon him for a declaration. But if the defendant does not get it returned and filed within two terms, the plaintiff may have a certificate thereof from the *filazer*, and thereupon the *curſitor* will make him out a writ of *procedendo*, which being obtained, he may proceed in his plaint in the court below.

Of the Declaration in Replevin.

THE declaration in replevin may be laid in the county where the cattle or goods were taken, or in the county into which they were driven after the taking. *F. N. B.* 69. *i.*

And the declaration ought to be not only of a taking in a ville or town, but alſo in *quodam loco vocat'*. But if the defendant would take advantage of his omiſſion, he muſt *demur* to the declaration. *Hob.* 16. *Bullithorp* v. *Turner*, *C. B. Tr.* 6, 17 *Geo.* 2.

But if the defendant would take advantage of a variance in the place where the taking is laid, from that in which it really was, he muſt plead it in *abatement*. 6 *Mod.* 103.

For *priſal in auter lieu* muſt be pleaded in abatement, and cannot be pleaded in bar, *Salk.* 3. *pl.* 8. 2 *Ld. Raym.* 1016. *Carth.* 344. *Show.* 98. And becauſe ſuch plea concluded with a *petit judicium*, and a return which is in bar, it was held ill.

The declaration muſt mention the cattle or goods demanded with ſuch certainty, that the ſheriff may make deliverance of them—and therefore it ſhould mention the ſorts or ſpecies, as sheep, cows, *&c.* *Carth.* 218.

If the cattle or goods are returned, the declaration ſhould ſay, *wherefore he took*, &c. *and detained them againſt gages and pledges*, *until*, &c. 1 *Saund.* 347.

But if they are not returned, the declaration muſt be, *wherefore he took*, &c. *and ſtill detains againſt gages and pledges*. *Co. Ent.* 610. *b.* *Roſt. Ent.* 560.

So if only part are returned, it ſhall ſay as to that, *detained until*, &c. and as to the reſidue, *ſtill detains*. *Co. Ent.* 611. *b.*

If the declaration is in the *detinuit*, and the plaintiff prevails, he ſhall have damages for the taking and coſts.

If in the *detinet*, and he prevails, he ſhall recover the value of the cattle or goods diſtrained, and his damages for the taking, and coſts. *F. N. B.* 69. *l.*

If defendant pleads *priſal in auter lieu*, he muſt go on and make an avowry *pro retorno*: yet ſuch avowry is only a ſuggeſtion to bring him within the ſtat. 21 *Hen.* 8. *c.* 19. for damages. Before that ſtatute no damages were given, and without ſuch a ſuggeſtion he is not within the ſtatute, but that being only for a particular purpoſe, is not traverſable. *Salk.* 94.

But if he pleads *property*, he ſhall have a return without making an avowry: for on demurrer, the court of *B. R.* reſolved

Of the Declaration in Replevin.

solved these points; 1*st*, That *property* may be pleaded either in bar or abatement; 2*d'y*, That where a collateral matter is pleaded in abatement, the defendant shall not have a return without making an avowry: but where the plea in abatement is to the point of the action, as *property* is, the defendant shall have a return without avowry; for whether property be in defendant or a stranger, the defendant ought to have a return, because he had the possession which was illegally taken from him by the *replevin*, when the plaintiff had no right. *Butler* v. *Porter*. *Salk*. 94. *pl*. 3.

How

How to proceed if the Plaintiff does not declare, &c.

IF the plaintiff declares, the defendant may *plead in abatement, or in bar*; or he may *avow* in his own right, *make conuſance in right of another, or juſtify.*

If the parties go on to *iſſue or demurrer*, the proceedings and practice therein are the ſame as in other actions.

If the plaintiff has removed the cauſe, and does not declare or proceed therein; or if the defendant has removed it, and after having ſerved the plaintiff with a rule to declare, and demanded a declaration, and the plaintiff does not declare and proceed therein, the defendant may ſign a *non-pros* and judgment *pro retorno habendo*, and then ſue out a writ *pro retorno habendo* *, which he may obtain of the *filazer*.

But note, if plaintiff dies after declaration, and before avowry, defendant cannot have a *retorno habendo*, but may diſtrain again. 2 *Wilſ.* 83. And the reaſon is, that by the declaration, the defendant is charged with an unjuſt caption and detention, and therefore muſt purge himſelf of ſuch charge by an avowry, before he can be entitled to have a return: for a return is adjudged by the court on the juſtice of the original caption; conſequently, the defendant muſt ſhew the juſtice of ſuch caption, before he can have a return.

The form of the writ *pro retorno habendo:*

GEORGE the Third, by the grace of God, *&c.* To the ſheriff of *Bucks*, greeting. Whereas *E. F.* was ſummoned to appear in our court before us [or before our juſtices] at *Weſtminſter*, to anſwer *C. D.* in a plea, wherefore he took the cattle of the ſaid *C.* to wit, one mare and four colts, and unjuſtly detained the ſame againſt ſureties and pledges, as he ſays; and the ſame *C.* afterwards in our ſaid court made default, whereupon it was then and there conſidered, that the ſaid *C.* and his pledges of proſecuting ſhould be in mercy, and that the aforeſaid *E.* ſhould go thereupon without delay, and that he ſhould have a return of the cattle aforeſaid. Therefore we command you, that you cauſe to be returned the cattle aforeſaid to the ſaid *E.* without delay; and the ſame at the complaint of the aforeſaid *C.* you do not deliver without our writ, which ſhall make expreſs mention of

* *Note:* If the diſtreſs was made for *rent*, ſee a better method of proceeding, *poſt.*

the

How to proceed if the Plaintiff does not declare, &c.

the aforeſaid judgment, and in what manner you ſhall execute this our precept, you ſhall make manifeſt *to us* [or *to our juſtices*] at *Weſtminſter*, on [a general return day, all the proceedings being *by original*]; and have you there this writ. Witneſs, *&c.* on, *&c.* in the twentieth year of our reign.

If, however, the plaintiff, even after ſuch judgment of *non-pros* ſigned, and this writ of *returno habendo* ſued out by the defendant, would wiſh to go on in his ſuit, he is at liberty ſo to do; and his application for that purpoſe muſt be made to the *filazer* for a *writ of ſecond deliverance*; which *writ of ſecond deliverance* is in the nature of a *ſuperſedeas* to the *writ pro returno habendo*, if brought before it be executed.

At the common law, if the plaintiff in replevin had been nonſuited, either before or after verdict, the defendant who diſtrained had judgment for a return, but not *irreplevisable*: So that the plaintiff might have had as many replevins as he would, which was vexatious and miſchievous. To remedy which, the ſtatute *Weſtm.* 2. *c.* 2. reſtrains the plaintiff from having any more replevins after a nonſuit, but gives him a *writ of ſecond deliverance*. 2 *Inſtit.* 340.

And if after ſuch *writ of ſecond deliverance* the plaintiff is non-proſſed, or becomes nonſuited, or the plea be diſcontinued, or the writ abates, or he prevails not in his ſuit, the defendant then ſhall have judgment for a return *irrepleviſable*. 2 *Inſtit.* 341.

The *writ of ſecond deliverance* is to the following effect:

" *GEORGE* the Third, *&c.* To the ſheriff of *Bucks*, greeting. We command you, if *C. D.* ſhall make you ſecure of proſecuting his complaint, and alſo of returning the cattle which to *E. F.* lately in our court, before *our juſtices* at *Weſtminſter*, at a certain day now paſt, were adjudged by the default of him the ſaid *C. D.* if a return thereof ſhall be adjudged; then the cattle to him the ſaid *C. D.* without delay, you cauſe to be delivered, and put by ſureties and ſafe pledges the aforeſaid *E. F.* that he be before our juſtices at *Weſtminſter* [the return], to anſwer the ſaid *C. D.* of the taking of the cattle aforeſaid, and that you have there the names of the pledges, *&c.* and this writ. Witneſs Sir *William de Grey*, knight, at *Weſtminſter*, the day of in the twentieth year of our reign.

If

How to proceed if the Plaintiff does not declare, &c.

If upon the return-day, or the appearance-day of the return-day of the *writ of ſecond deliverance*, the plaintiff declares, the ſubſequent proceedings are the ſame as in other caſes throughout the cauſe.

If the plaintiff does not ſue out a *writ of ſecond deliverance*, and the ſheriff ſhould return to the *writ pro retorno habendo*, that the cattle, &c. were *eloined* or removed to places unknown, by reaſon of which he could not return the ſame to the defendant, as by the ſaid writ he was commanded, then upon ſuch return of *elongata*, the defendant ſhall have a *capias in withernam*, which is to the following effect, and which is alſo obtained of the *filazer*:

GEORGE the Third, *&c.* To the ſheriff of *Bucks*, greeting: Whereas *E F.* was ſummoned to appear in our court, before *our juſtices* at *Weſtminſter*, to anſwer *C. D.* of a plea, wherefore he took the cattle of the ſaid *C.* and unjuſtly detained the ſame againſt ſureties and pledges, as he ſays; and the ſame *C* afterwards, in our ſame court, made default in the ſame plea; whereupon it was then and there conſidered, that the ſame *C.* and his pledges of proſecution ſhould be in mercy; and that the ſaid *E.* ſhould go thereupon without delay, and that he ſhould have a return of the cattle aforeſaid: whereupon, by our writ, we commanded you, that you cauſed to be returned the cattle aforeſaid to the ſaid *E.* without day, and the ſame at the complaint of the ſaid *C.* you ſhould not deliver without our writ, which of the aforeſaid judgment ſhould make expreſs mention, and in what manner you ſhould have executed our ſaid precept you ſhould make manifeſt to *our juſtices* at *Weſtminſter*, on [the return-day of the *retorno habendo*] laſt paſt, on which day you returned to *our ſaid juſtices* at *Weſtminſter*, that before the coming of the aforeſaid writ the cattle aforeſaid were eloined or conveyed away to places unknown to you by the ſaid *C.* ſo that the cattle aforeſaid to the ſaid *E.* you could not cauſe to be returned as by the ſaid writ you was commanded: *therefore*, we command you, that of the cattle of him the ſaid *C.* to the value of the cattle before taken *in withernam*, you take and deliver to him the ſaid *E.* to be held by him until the ſaid cattle, before taken, you can cauſe to be returned; and put by ſure and ſafe pledges the aforeſaid *C.* that he be before *our juſtices* at *Weſtminſter*, on [the return-day], to anſwer as well to us of the contempt, as

How to proceed if the Plaintiff does not declare, &c.

to the ſaid *E.* of the damages and injuries to him in that behalf done; and in what manner this our precept you ſhall execute make appear to *our juſtices* at *Weſtminſter*, at the aforeſaid return; and that you have there the names of the pledges, and this writ. Witneſs, *&c.* on, *&c.* at, *&c.* in the *twentieth year of our reign.*

The writ of *withernam* is but *meſne proceſs*. *Ld. Raym.* 614. *Vide Comb.* 201. 2 *Salk.* 582.

W. ſued a replevin. *H.* removed it by *recordari* into the *King's Bench*; the plaintiff did not declare, and upon that a return was awarded to *H.* upon which the ſheriff returns *averia elongata*, and then a *withernam* was awarded and executed; afterwards the plaintiff came and prayed that he might be admitted to declare; and alſo prayed a deliverance of the cattle taken *in withernam:* and it was teſtified by the clerks, that upon the plaintiff's ſubmiſſion to a *fine* for not declaring, and that being impoſed upon him by the judges, he ſhall have deliverance of the *withernam:* and a fine of 3 *s.* 4 *d.* being accordingly impoſed on the plaintiff, he then declared, and had deliverance. *Noy*, 50. *Webb and Hind*; but ſaid, that the courſe of *B. R.* is contrary to that of *C. B.*

If the ſheriff ſhould return *nulla bona vel catalla ad valorem, &c.* to the *writ of withernam*, the defendant may ſue out an *alias capias in withernam*, and after that a *pluries*.

How to proceed if the Defendant does not appear, &c.

IF the plaintiff has removed the cauſe, and the defendant has not appeared upon the return, or at leaſt upon the appearance-day of the return of the *reſala*; the plaintiff ſhould ſerve him with a rule to appear, and upon his non-appearance thereto ſue out a *pone*, which is to this effect:

GEORGE the Third, *&c.* To the ſheriff of *Bucks*, greeting: Put by ſureties and ſafe pledges, *E. F.* that he be before *our juſtices* at *Weſtminſter*, from [the return-day], to anſwer to *C. D.* of a plea, wherefore he took the cattle, goods, and chattels of the ſaid *C.* and them unjuſtly detained againſt gages and pledges, as he ſaith, and to ſhew wherefore he hath not appeared in our court before *our juſtices* at *Weſtminſter* from [the return of the *reſala*] laſt paſt, as the day prefixed to him; and have you there the names of the pledges, and this writ. Witneſs Sir *William de Grey*, knight, at *Weſtminſter*, the day of ; in the twentieth year of our reign.

If upon the return of the *pone*, the defendant does not appear, the plaintiff may ſue out a *diſtringas ad infinitum* till he does appear; which *diſtringas* is to the ſame effect as other writs of *diſtringas*, to compel an appearance of the party in court.

How the Plaintiff is to proceed if the Defendant has removed the Suit, and does not file the REFALO.

IF the defendant has taken out the *recordari facias loquelam*, and does not get it returned and filed within two terms, the plaintiff ſhould apply to the *filazer* for a certificate that the ſame is not returned and filed; which certificate, when obtained, is a ſufficient warrant for the *curſitor* to make out a *writ* of *procedendo*, which remands the cauſe to the county-court to be there determined. Which *writ of procedendo* is to this effect:

GEORGE the Third, *&c.* To the ſheriff of *Bucks*, greeting: Although we lately commanded you, that in your full court you cauſed the plaint to be recorded, which is in the ſame county, without our writ, between *C. D.* and *E. F.* of the cattle, goods and chattels of the ſaid *C.* taken and unjuſtly detained, as it was ſaid; and that you ſhould have the ſaid record *before our juſtices* at *Weſtminſter*, from [the return of the *refalo*], under your ſeal, and the ſeals of four lawful knights of the ſame county, of ſuch as ſhould be preſent at the ſaid record, and that you prefixed the ſame day to the parties, that then they might be there ready to proceed in the ſaid plaint, as ſhould be juſt; and that you ſhould have there the names of the ſaid four knights, and that writ. Yet we being now moved with certain cauſes in our court, before our ſaid juſtices, command you, that in the ſame plaint, againſt the ſaid *E. F.* at the ſuit of the ſaid *C. D.* before you levied or affirmed, and now depending undetermined, you proceed at your next county-court to be holden in and for the ſame county, with what ſpeed you can, in ſuch manner, according to the law and cuſtom of *England*, as you ſhall ſee proper; our ſaid writ in that behalf heretofore directed to the contrary in any wiſe notwithſtanding. Witneſs, *&c.* on, *&c.* at, *&c.* in the twentieth year of our reign.

How

How the Defendant may proceed in caſe the Diſtreſs was for RENT after the Cauſe removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

IF the cauſe has been removed into the ſuperior court by the *plaintiff*, and after the defendant has appeared he does not declare or proceed therein; or if the cauſe has been removed by the *defendant*, and a rule being ſerved on the plaintiff, he does not declare or proceed therein; the defendant may ſign a *non-pros*, enter up judgment *pro retorno habendo*; and if the *original diſtreſs* was made *for rent*, he may proceed to execute a writ of inquiry of damages, which is the better way than taking out a writ *pro retorno habendo*; becauſe that writ may be ſuperſeded by the plaintiff's ſuing out a *writ of ſecond deliverance*, as was ſeen before. For by the *ſtat.* 17 *Car.* 2. *c.* 7. an act for the more ſpeedy and effectual proceeding upon diſtreſſes and avowries for RENTS, reciting, that "Foraſmuch as the ordinary "remedy for arrearages of rents, is by diſtreſſes upon the lands "chargeable therewith; and yet nevertheleſs, by reaſon of the "intricate and dilatory proceedings upon replevins, that remedy "is become ineffectual:" *It is enacted*, "That whenſoever "any plaintiff in replevin ſhall be nonſuit before iſſue joined, "in any ſuit of replevin by plaint or writ lawfully returned, "removed or depending in any of the king's courts at *Weſt-"minſter*, that the defendant making a *ſuggeſtion*, in nature of "an avowry or cognizance for ſuch rent, to aſcertain the "court of the cauſe of diſtreſs, the court upon his prayer ſhall "award a writ to the ſheriff of the county where the diſtreſs "was taken, to enquire by the oaths of twelve good and law-"ful men of his bailiwick, touching the ſum in arrear at the "time of ſuch diſtreſs taken, *and* the value of the goods or "cattle diſtrained: and thereupon notice of fifteen days ſhall "be given to the plaintiff, or his attorney, in court, of the "ſitting of ſuch inquiry: and thereupon the ſheriff ſhall in-"quire of the truth of the matters contained in ſuch writ, by "the oaths of twelve good and lawful men of his county: "and upon the return of ſuch inquiſition, the defendant ſhall "have judgment to recover againſt the plaintiff the arrear-"ages of ſuch rent, in caſe the goods or cattle diſtrained "ſhall amount unto that value: and in caſe they ſhall not "amount to that value, then ſo much as the value of the ſaid "goods and cattle ſo diſtrained ſhall amount unto, together "with his full coſts of ſuit: and ſhall have execution there-"upon by *fieri facias* or *elegit*, or otherwiſe, as the law ſhall

How the Defendant may proceed in caſe the Diſtreſs was for RENT after the Cauſe removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

" require. *And* in caſe ſuch plaintiff ſhall be nonſuit after " cognizance or avowry made, and iſſue joined, or if the ver- " dict ſhall be given againſt ſuch plaintiff, then the jurors that " are impanelled, or returned to inquire of ſuch iſſue, ſhall, " at the prayer of the defendant, inquire concerning the ſum " of the arrears, *and* the value of the goods or cattle diſtrained: " and thereupon the avowant, or he that makes cognizance, " ſhall have judgment for ſuch arrearages, or ſo much thereof " as the goods or cattle diſtrained amount unto, together with " his full coſts, and ſhall have execution for the ſame by *fieri* " *facias* or *elegit*, or otherwiſe as the law ſhall require."

Sect. 3. gives the like remedy to the *avowant*, *&c.* upon a judgment given for him upon *demurrer*.

And *ſect.* 4 enacts, " That in all caſes aforeſaid, where the " value of the cattle, diſtrained as aforeſaid, ſhall not be found " to be the full value of the arrears diſtrained for, that the " party to whom ſuch arrears were due, his executors or ad- " miniſtrators, may, from time to time, diſtrain * again for " the reſidue of the ſaid arrears."

It has been the cuſtom ever ſince this ſtatute, as it was before, in all caſes when the plaintiff is *nonproſſed*, to enter judgment *pro retorno habendo*; but notwithſtanding, the defendant may enter a *ſuggeſtion* according to this ſtatute, and take out a writ of *inquiry*; and if the plaintiff ſhould take out a *writ of ſecond deliverance* afterwards, it will be no *ſuperſedeas* to ſuch *writ of inquiry*; although ſuch *writ of ſecond deliverance* would be a *ſuperſedeas* to the *writ de retorno habendo*.

Rule to ſhew cauſe, why the inquiſition on a *writ of inquiry* of damages, final judgment, and *fi. fa.*, ſhould not be ſet aſide. Diſtreſs was for a *rent charge*; and after *reſalo* returned and filed, and rule given to declare, judgment *de retorn. habend.* was ſigned for want of a declaration; and a writ of *retorn. habend.* iſſued 12 *July* 1759, but was never executed. The 2d of *October*, plaintiff ſued out a writ of *ſecond deliverance*, given by *Weſtm.* 2. Defendant did not proceed on the writ of *retorn. habend.* but entered a ſuggeſtion on record, according to the 17 *Car.* 2. and the 27 *Oct.* gave notice of the execution of the

* A ſecond diſtreſs might have been taken by *common law* in ſuch caſe.

writ

How the Defendant may proceed in caſe the Diſtreſs was for RENT after the Cauſe removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

writ of inquiry of damages, having then had no notice of the writ of *ſecond deliverance*, though of that he had notice before the execution of the writ of inquiry.—On the plaintiff's part it was urged, that the *ſecond deliverance* removes the judgment of *return habend.* and opens the cauſe again: that if the *return. habend.* be not executed, the *ſecond deliverance* ſuperſedes it; if executed, it brings back the diſtreſs. That after the merits tried under the *ſecond deliverance*, the diſtreſs will be irreplevisable. On the writ of *return. habend.* awarded, the writ of *ſecond deliverance* is given the party to reinſtate him. That the defendant cannot enter a *ſuggeſtion* whilſt the judgment of *return. habend.* (which is a *nonſuit*) ſubſiſts. But the court thought otherwiſe, and held, that a writ of *ſecond deliverance* (which is not taken away by 11 *Geo* 2.) is no *ſuperſedeas* to the writ of inquiry of damages. If defendant had proceeded on the writ *de return. habend.* the court would have ſtopped him; but he made his option to proceed under the *ſtatute of Car.* 2. which he had a right to do. This and the former ſtatute were intended to prevent delay, and give the party a better remedy.—The ſtat. 21 *Hen.* 8. *c.* 19. gives damages in compenſation of trouble and expence. The 22 *Hen.* 8. *c.* 15. gives coſts where a *nonſuit*. The old ſtatutes mention the writ of *ſecond deliverance*, the new do not; vide *Carth.* 253. *Palm.* 403. *Latch.* 72. Rule diſcharged. If this conſtruction was not put upon the *ſtatute of Car.* 2. it would be totally nugatory. *Cooper* v. *Sherbrook. Barnes*, 426. 2 *Wilſ.* 116.

The entry of a ſuggeſtion in the nature of a *cognizance*, is as follows:

Bucks, to wit. *E. F.* was ſummoned to anſwer *C. D.* in a plea, wherefore he took the cattle, goods, and chattels of the ſaid *C.* and unjuſtly detained the ſame againſt gages and pledges, *&c.* and whereupon the ſaid *E.* offered himſelf in court here, in his own proper perſon, on the day of againſt the ſaid *C.* in the plea aforeſaid, and the ſaid *C.* came not, but made default. Therefore it is conſidered, that the ſaid *C.* and his pledges for proſecuting be in mercy, and that the ſaid *E.* go thereof without day, and have a return of the ſaid cattle, goods and chattels, *&c.* and thereupon the ſaid *E.* ſays, that he the ſaid *E.* took the ſaid

How the Defendant may proceed in caſe the Diſtreſs was for RENT after the Cauſe removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

cattle, goods, and chattels, of the ſaid *C.* for the taking whereof he was ſummoned to appear in the ſaid court of our ſaid lord the king *of the bench* at *Weſtminſter*, to anſwer to the ſaid *C.* as aforeſaid, at the pariſh of *O.* in the ſaid county, in a certain place there called the ſtable; and that he took the ſame as bailiff of *I. A.* for that the ſaid *C.* at the time of the taking the ſaid cattle, goods, and chattels, and for the ſpace of two years and three quarters of a year ended at and upon the day of and from thence until the time of the taking of the ſaid cattle, goods, and chattels, held and enjoyed the ſaid ſtable, with the appurtenances, amongſt other things, as tenant thereof, to the ſaid *I. A.* at and under the yearly rent of twelve pounds, payable quarterly; and becauſe the ſum of thirty-three pounds, of the yearly rent aforeſaid, for two years and three quarters of another year, ending at and upon the ſaid day of in the ſaid year of our Lord 1779, on that day, in that year, and at the time of taking the ſaid cattle, goods, and chattels, were in arrear and unpaid, he the ſaid *E.* as bailiff of the ſaid *I.* took the ſaid cattle, goods, and chattels, for and in the name of a diſtreſs for the ſaid rent ſo due in arrear and owing from the ſaid *C.* to the ſaid *I.* as aforeſaid. And the ſaid *E.* according to the form of the ſtatute in ſuch caſe made and provided, prays a writ of our lord the king to be directed to the ſheriff of *Bucks*, to enquire of the ſum in arrear of the rent aforeſaid, and of the value of the cattle, goods, and chattels aforeſaid; and it is granted to him: wherefore the ſheriff is commanded, that, by the oath of twelve good and lawful men of his bailiwick, he diligently enquire how much rent was in arrear and due to the ſaid *I.* at time of the taking of the cattle, goods, and chattels aforeſaid; and how much the ſaid cattle, goods, and chattels, ſo taken in the name of a diſtreſs as aforeſaid, were worth, according to the true value thereof; and the inquiſition which he ſhall thereupon take, let him make appear here on [the return day], under his ſeal and the ſeals of thoſe by whoſe oath he ſhall take the ſaid inquiſition, *&c.*

Upon entering the above *ſuggeſtion* on a *roll*, the defendant may then ſue out his writ *of enquiry*, which is to the following effect:

GEORGE

How the Defendant may proceed in caſe the Diſtreſs was for RENT after the Cauſe removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

GEORGE the Third, by the grace of God, *&c.* To the ſheriff of *Bucks*, greeting: Whereas *E. F.* was lately ſummoned to appear in our court *of the bench, before our juſtices* at *Weſtminſter*, to anſwer unto *C. D.* of a plea, wherefore he took the cattle, goods, and chattels of the ſaid *C.* and unjuſtly detained the ſame againſt gages and pledges, until, *&c.* and the ſaid *E. F.* offered himſelf in court, before *our juſtices* at *Weſtminſter*, in his own proper perſon, on the day of againſt the ſaid *C.* in the plea aforeſaid: and the ſaid *C.* came not, but made default. Therefore it was conſidered, that the ſaid *E.* and his pledges ſhould be in mercy; and that the ſaid *E.* ſhould go thereof without day, and have a return of the ſaid cattle, goods, and chattels. And thereupon it hath been ſuggeſted to us in our ſaid court, before *our ſaid juſtices* at *Weſtminſter* aforeſaid, by the ſaid *E.* that he the ſaid *E.* took the ſaid cattle, goods, and chattels of the ſaid *C.* for the taking whereof he was ſummoned to appear in our ſaid court *of the bench, before our ſaid juſtices* at *Weſtminſter*, to anſwer the ſaid *C. D.* as aforeſaid, at the pariſh of *O.* in the ſaid county, in a certain place there called the ſtable; and that he took the ſame as bailiff of *J. A.* for that the ſaid *C.* for the ſpace of two years, and three quarters of another year, ending at and upon the ſaid day of in the year of our Lord 1779; and from thence, until and at the time of taking of the ſaid cattle, goods, and chattels, held and enjoyed the ſaid ſtable, with the appurtenances, amongſt other things, as tenant thereof to the ſaid *J.* at and under the yearly rent of twelve pounds, payable quarterly: and becauſe the ſum of thirty-three pounds of the yearly rent aforeſaid, for two years, and three quarters of another year, ending at and upon the ſaid day of in the year of our Lord 1779, on that day in that year, and at the time of taking the ſaid cattle, goods, and chattels, were in arrear, and unpaid to the ſaid *J.* he the ſaid *E.* as bailiff of the ſaid *J.* took the ſaid cattle, goods, and chattels, for and in the name of a diſtreſs for the ſaid rent ſo due in arrear and owing from the ſaid *C.* to the ſaid *J.* as aforeſaid. And the ſaid *E.* according to the form of the ſtatute in ſuch caſe made and provided, prayed our writ to be directed to you,

to

How the Defendant may proceed in caſe the Diſtreſs was for RENT after the Cauſe removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

to enquire of the ſum in arrear of the rent aforeſaid, and of the value of the cattle, goods, and chattels aforeſaid. Therefore we command you, that according to the form of the ſtatute in that caſe made and provided, you diligently enquire, by the oath of twelve good and lawful men of your county, how much of the yearly rent aforeſaid, at the time of taking the ſaid cattle, goods, and chattels, were in arrear and unpaid; and how much the ſaid cattle, goods, and chattels, taken as aforeſaid, were worth, according to the true value of the ſame. And the inquiſition which you ſhall thereupon make you ſhall certify to *our juſtices* at *Weſtminſter* on [the return], under your ſeal, and the ſeals of thoſe by whoſe oath you ſhall take that inquiſition; and have you there the names of thoſe by whoſe oath you ſhall take that inquiſition, and this writ. Witneſs Sir *William De Grey*, knight, at *Weſtminſter*, the day of in the twentieth year of our reign.

Upon this writ of enquiry the whole fact is to be proved and may be litigated. *Cooper* v. *Sherbrook*. *E.* 32 *Geo.* 2. *C. B.*

If *A.* diſtrains *B.* for *rent*, and *B.* replevies, and gives the uſual bond to proſecute, then levies his plaint, and afterwards removes the ſame by *recule*, and then does not declare; or if he declares, and *A.* avows, and *B.* not putting in a plea in bar, the avowant have judgment by default, that *B.* ſhall be amerced, and avowant have a *retorno habendo*.—*A.* in ſuch caſe may either ſue out a *writ of enquiry* of damages, according to this ſtatute 17 *Car.* 2. *c.* 7. or he may commence actions on the replevin bond [taken according to the 11 *Geo.* 2. *c.* 19. *ſ.* 23.] againſt the plaintiff and his bondſmen, to recover his damages and coſts.

As the ſtatute 17 *Car.* 2. *c.* 7. relates only to diſtreſſes for *rent*, and gives a writ of enquiry *by default*, &c. if the diſtreſs was for *damage feaſant*, after judgment *pro retorno habend.* the defendant's remedy is by writ *de retorno habend.* and if an *elongata* is returned, he may have a *withernam*, &c. or if the ſheriff has taken inſufficient pledges, he may have an action againſt the ſheriff for ſuch inſufficiency of the pledges; or if the

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the ſheriff took a *replevin bond*, and aſſigns the ſame to the defendant, he may have an action on ſuch bond againſt the bondſmen.

But in caſes of *damage feaſant*, &c. the ſheriff is not obliged to take a *replevin bond*, nor can he compel the plaintiff to find bondſmen and enter into a bond [the ſtat. 11 *G.* 2. *c.* 19. *ſ.* 23. only relating to diſtreſſes for *rent*]; but then the ſheriff, before he makes *replevin*, may inſiſt upon ſufficient pledges *pro retorno habendo*, in purſuance of *Weſtm.* 2. *c.* 2. and then the defendant, after *elongata* returned to the *writ de retorno habendo*, may have a *ſcire facias* againſt ſuch pledges—or if the plaint was never removed from the court below after a *non-pros* ſigned, he may have a *precept* in the nature of a *ſcire facias*. Vide 2 *Wilſ.* 41.

By the ſame ſtatute 17 *Car.* 2. *c.* 7. if the plaintiff is *nonſuited* after iſſue joined, or if verdict is given againſt him, the jury returned or impanelled, at the prayer of the defendant, ſhall enquire of the rent in arrear, and the value of the goods, &c. diſtrained, &c.

But if in ſuch caſe the jury impanelled omit to enquire of the value of the rent arrear, or of the cattle, the defendant cannot then have a writ of enquiry to ſupply that omiſſion, becauſe the ſtatute confines it to *the jury impanelled in the cauſe*. 1 *Lev.* 255. Therefore, in ſuch caſe, the defendant muſt take judgment *de retorno habendo* at common law. *Tucket* v. *Stephens.* *P.* 6 *Geo.* 1. *C. B. Carth.* 362.

And if the jury find for damages the amount of the rent avowed for, and omit to find the value of the rent and of the cattle—or if they omit to find either the value of the rent or of the cattle diſtrained, or find only the one or the other, the defendant can only have judgment *pro retorno*—for they muſt find both the value of the rent and of the diſtreſs, to entitle defendant to take a judgment and have execution according to the ſtatute by *fi. fa. ca. ſa.* &c.

Defendant had avowed for a year's rent, and had a verdict, but no value was found by the jury; whereupon a writ of inquiry was moved for under the 17 *Car.* 2. to aſcertain the rent in arrear, and the value of the cattle. *Gould juſtice*, doubted whether it could be granted to ſupply a *defective verdict* in caſe of rent; though after a verdict by *default*, it would certainly

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lie, and cited *Stephens* and *Spiller*. In anſwer to which, *Andrews* and *Jones*, *M.* 24 *Geo.* 2. *B. R.* was cited as in point. But *Gould* ſaid, that from a note of Mr. *Burrow*, that appeared to be a judgment by default. However, no cauſe being ſhewn, the rule was made abſolute. *Freeman* v. *Lady Archer. Tr.* 11 *Geo.* 3. *C. B.* 2 *Blackſ. Rep.* 763.

In writs of enquiry under this ſtatute, the jury ſet their hands and ſeals to the *verdict*; and upon the trial of ſuch writs, the judge of *niſi prius* is only aſſiſtant to the ſheriff, and has no judicial power. And if the parties come to any agreement at the trial, the way is to bring it to the judge to ſign, and afterwards move to have it made a rule of court. *Caſ. K. B.* 519. 610.

By the 21 *Hen.* 8. *c.* 19. *ſ.* 3. it is enacted, "That every avowant, and every other perſon or perſons that make any avowry, juſtification, or conuzance, as bailiff or ſervant to any perſon or perſons in any *replegiare* or ſecond deliverance, for *rents, cuſtoms, ſervices, or for damages feaſant, or rent or rents* upon any diſtreſs taken in any lands or tenements, if the ſame avowry, cognizance, or juſtification be found for them, or the plaintiffs in the ſame be nonſuit, or otherwiſe barred, that then they ſhall recover their *damages and coſts* againſt the ſaid plaintiffs, as the ſame plaintiffs ſhould have done or had, if they had recovered in the *replegiare*, or ſecond deliverance found againſt the defendants."

Neither this ſtatute, nor the 43 *Eliz.* [if the defendant avows as overſeer for a diſtreſs for a poor rate], tie the inquiſition up to the *ſame jury* as are returned or impanelled, as the 17 *Car.* 2. *c.* 7. does. *Salk* 95.

In replevin the defendant avowed, and the plaintiff being nonſuited, brought a writ of ſecond deliverance, whereupon it was moved to ſtay the writ of enquiry of damages. *Et per Cur.* This is a *ſuperſedeas* to the *returno habendo*, but not to the writ of enquiry of damages; for theſe damages are not for the thing avowed for, but are given by the ſtat. 21 *H.* 8. *c.* 19. as a compenſation for the expence and trouble the avowant has been at. *Salk.* 95. *pl.* 6. *Palm.* 403. *Latch.* 72.

If the plaintiff is nonſuited for want of delivering a declaration, if it was through any cauſe that would have entitled him to a writ of *ſecond deliverance*, as ſickneſs of the perſon employed,

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ed, &c. the court will order the defendant to accept of a declaration on payment of coſts: otherwiſe, the plaintiff would be remedileſs, *the writ of ſecond deliverance* being taken away by the 17 *Car.* 2. in caſes of *rent*. *Vent.* 64.

No *ſecond deliverance* lies after a judgment on demurrer, or after a verdict, or confeſſion of the avowry; but in all theſe caſes, the judgment muſt be entered with a return irreplevisable. But upon a nonſuit either before or after evidence, where the diſtreſs was not for *rent*, a *writ of ſecond deliverance* will lie, becauſe there is no determination of the matter; and there a *writ of ſecond deliverance* lies, to bring the matter in queſtion: but in the caſe of a demurrer and verdict, the matter is determined by law; and in the caſe of a confeſſion, it is determined by the confeſſion of the party. 2 *Lill. Reg.* 457.

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THE plaintiff pleaded two matters in bar to an *avowry*, and on one of the pleas the fact was found for him, but the judge did not certify [according to 4 *Anne*, *c.* 16. *ſ.* 5.] that the plaintiff had probable cauſe to plead the other plea. The defendant moved for coſts purſuant to that ſtatute; and the queſtion was, whether the proceedings were within that ſtatute or not? the avowant in replevin being omitted in the words of the ſtatute. Rule to ſhew cauſe why the plaintiff ſhould not pay coſts was enlarged. *Barnes*, 144.

The defendant made two *avowries*, and plaintiff obtained an order for time to plead, pleading iſſuably, and taking notice of trial for the ſitting after laſt term in *Middleſex*, and within time *demurred* to the *firſt*, and pleaded in bar to the *latter*; and upon that the defendant ſigned a *nonpros* for want of pleading iſſuably to both avowries, which the court held to be regular. But upon payment of coſts, pleading iſſuably, and taking notice of trial within the ſame term, the *nonpros* was ſet aſide. *Barnes*, 314.

After joinder in *demurrer*, plaintiff obtained a rule for the avowant to ſhew cauſe why he ſhould not diſcontinue on payment of coſts; it was objected for the avowant, that a diſcontinuance in replevin is very different from a *nonpros*; and that after a diſcontinuance, a *writ de retorno habendo* could not be awarded. The court, however, did not enter into that matter, as the parties entered into a rule by conſent, to ſtay proceedings on payment of the rent arrear with coſts. *Barnes*, 171.

In *replevin*, both plaintiff and defendant may carry down the record to trial.

The defendant brought down the record, but the plaintiff did not appear at the aſſizes; upon which, the defendant's counſel inſiſted ſtrongly on a verdict, which was complied with. But afterwards, upon application by the plaintiff to ſet the verdict aſide, the court, after hearing the judge's report, ordered the *poſtea* to be amended, and a *nonſuit* to be returned, inſtead of a verdict for the defendant; and that he ſhould pay the coſts of the motion. *Barnes*, 458.

On motion for judgment as in *caſe of a nonſuit*, a diſtinction was endeavoured to be made from common caſes, becauſe in replevin defendant might, in the firſt inſtance, have carried down the record to trial. *Per Cur.* The act of parliament has made no diſtinction. *Barnes*, 317.—But the *King's Bench* hold, that the defendant in replevin ought never to have judgment as in

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in case of a *nonsuit*, as he himself is an actor, and may carry the cause down. *Sayer on Costs*, 142.

And as both plaintiff and defendant are actors, and may carry the cause down, if defendant give notice, and do not go to trial, the court will give costs against him; and for the same reason the defendant may not move for judgment of *nonsuit*, unless the plaintiff have given notice of trial. *Eggleton* v. *Smart*. Tr. 2 *Geo*. 3. Vide 1 *Black*. *Rep*. 375.

The plaintiff's goods distrained were not replevied, but, by consent of the attornies on both sides, remained in the distrainors hands; and without any writ of *recolo* or appearance in the court above, the plaintiff declared, the defendants avowed, and after long special pleadings, and after trial of the issues at the assizes, and a verdict for the plaintiff, the avowants moved to set aside all the proceedings; and the rule for that purpose was made absolute. The court held the agreement to be void, a fraud upon the revenue and officers, and an abuse of the court and the bar; that they had no jurisdiction, and consequently could not give judgment. *Barnes*, 451.

Replevin for taking cattle in *a certain place called the Brills, in a certain other place there called the Boggs*, the defendant avowed the taking *in the place*, in which, *&c.* because *H.* was seised in fee of the *locus in quo*, &c. The plaintiff demurred, because here are two places alledged, and the avowant has only answered to the *locus in quo*, &c. which is but one of the two places. *Et per Cur.* it is a discontinuance. *Week* v. *Speed*, *Salk*. 94.

The stat. 11 *Geo*. 2. *c*. 19. *s*. 22. gives the defendant or defendants in *replevin* making avowry, or cognizance upon distresses for *rent*, *relief*, *heriot*, *or other service*; in case the plaintiff in the action shall become *nonsuit*, *discontinue*, *or have judgment* against him, *double costs*.

But where defendant avowed the taking and detaining an ox, as a seizure, for *heriot custom* (claiming no right to distrain), and plaintiff became nonsuit, and the prothonotary had allowed defendant double costs, taking the case to be within the stat. 11 *Geo*. 2. The court, on motion that the prothonotary might review his taxation, made the rule for that purpose absolute; holding, that the avowry not being for taking the ox as a *distress*, is out of the stat. For heriot *service*, cattle, *&c.* are distrainable; for heriot *custom* not. *Lloyd* v. *Winton*. *Barnes*, 148. 2 *Wilf*. 28.

Before I conclude this title it may not be improper to remark, that formerly if there was any irregularity in a distress, the

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the party making it was deemed a treſpaſſer *ab initio*, and liable to make ſatisfaction to the party diſtrained; but now, by 11 *Geo.* 2. *c.* 19. "a diſtreſs for rent ſhall not be deemed unlawful for any "irregularity in the diſpoſition of it afterwards, nor the party "making it a treſpaſſer *ab initio*; but the party aggrieved may "recover full ſatisfaction for the ſpecial damage he ſhall have "ſuſtained thereby, and no more, in an action of *treſpaſs*, or "*on the caſe, unleſs tender of amends have been before made.*"— And by 17 *Geo.* 2. *c.* 38. "where any diſtreſs is made for "money juſtly due for the relief of the poor, it ſhall not be "deemed unlawful, nor the party making it a *treſpaſſer*, on "account of any defect or want of form in the warrant of "appointment of ſuch overſeers, or in the rate of aſſeſſments, "or in the warrant of diſtreſs thereupon; nor ſhall the party "be deemed a *treſpaſſer ab initio*, on account of any irregularity which ſhall afterwards be done by him; but the party "grieved may recover for the ſpecial damage, *unleſs tender of* "*amends have been before made.*"

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If there is judgment for the *plaintiff* upon a *relicta verificatione*, *cognovit actionem*, *nil dicit*, &c. or for want of a replication to his plea in bar to the avowry, or upon a demurrer, *a writ of enquiry* of damages ſhall be awarded. *Com. Dig.* 5 *Vol.* 303.

Or at the requeſt of the plaintiff, by the aſſent of the defendant, the juſtices may aſſeſs the damages without a writ of enquiry.

But if there is judgment for the plaintiff in replevin, *quod adhuc detinet* by default after appearance, there ſhall be a *ſpecial writ of enquiry* for the value of the goods or cattle and damages. *F. N. B.* 69. *l. Co. Ent.* 611. *a.*

But where the taking was lawful, the damage ſhall be only for the detainer, as where goods are taken *damage feaſant*, and detained after amends tendered. *F. N. B* 69. *t. g.*

If there is a verdict for the *plaintiff*, the jury uſually aſſeſs the damages. 2 *Saund.* 315.

Or the jury after verdict may be diſmiſſed, and damages aſſeſſed by the juſtices, with the defendant's conſent.

Or if the jury do not aſſeſs the damages, and the g ods, *&c.* ſhould be detained, the plaintiff may make a ſuggeſtion thereof upon the roll, whereupon a writ ſhall go to enquire of the value of the cattle, *&c.* and damages; upon which the plaintiff ſhall have judgment for both.

In *replevin*, defendant avowed as overſeer for the poor's rate, and had a verdict, but the jury did not aſſeſs any damages. He ſigned final judgment, and the prothonotary allowed him 42*l.* 10*s.* coſts, after which he moved for a *writ of enquiry*, being intitled to recover treble damages by the ſtat. 43 *of El.* by reaſon of the wrongful vexation, with his coſts alſo ſuſtained. Whereupon a rule was made to ſhew cauſe. On ſhewing cauſe, it was objected for plaintiff, 1*ſt*, That the defendant having already ſigned final judgment, and had his coſts taxed, had made his election, and now comes too late. 2*dly*, That the damages muſt be aſſeſſed by the ſame jury, as appears by the 19*th ſect.* of that ſtatute. But *per Cur.* The ſame jury who tried the iſſue may aſſeſs the damages; but if they do not, we muſt do juſtice, and award a *writ of enquiry* to the ſheriff; and a writ was awarded accordingly. *Dewell* v. *Marſhall.* C. B. 3 *Wilſ.* 442. *Vide Carth.* 362.

The difference is this. Where the matter omitted to be enquired by the principal jury, is ſuch as goes to the very point of the iſſue, and upon which, if it is found by the jury, an *attaint* will lie againſt them by the party, if they have given a falſe verdict; there ſuch matter cannot be ſupplied by a *writ of*

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inquiry, becauſe thereby the plaintiff may loſe his action of *attaint*, which will not lie upon an *inqueſt of office*.

But where the matter omitted to be inquired by the principal jury does not go to the point of the iſſue, or neceſſary conſequence thereof, but are things merely collateral, as damages are in the above caſe, and the four uſual inquiries on a *quare impedit*, ſuch may be ſupplied by a ſubſequent *writ of inquiry*, without any damage to the party; becauſe if the ſame had been inquired into by the principal jury, it would have been (as to theſe particulars) no more than an *inqueſt of office*, upon which an *attaint* will not lie.

If there is judgment for the defendant upon a demurrer or verdict, or the plaintiff is nonſuited, the defendant ſhall have return *irreplevisable*; but if the nonſuit is before verdict, the judgment for a return is not *irreplevisable*. 14 *Hen.* 7. 6. *b.* 34 *Hen.* 6. 5. *a.*

If the diſtreſs was for *rent*, and plaintiff is *nonpreſſed*, or judgment is given againſt him upon *demurrer*, the defendant may have a *writ of inquiry* according to 17 *Car.* 2. *c.* 7. which vide *ante*. But if *verdict* is given for the defendant, or the plaintiff is nonſuited after iſſue joined, &c. the jury impanelled or returned ſhall inquire what arrear, and of what value the diſtreſs is, &c. and after ſuch inquiſition he ſhall have a *fi. fa. elegit*, &c.

If the defendant, upon the judgment *de retorno habendo*, ſue out a writ *pro retorno habendo*, and the ſheriff cannot find the cattle, he may have a *capias in withernam*, upon the return of *elongata*. 2 *Leon.* 174.

But if the defendant has judgment for a *return irreplevisable*, if the owner of the cattle or goods tenders all that is due on the judgment, and it is accepted, he ſhall have a *writ of delivery* for the goods. 2 *Inſtit.* 107.

So if he tenders the whole upon the judgment, which is aſcertained upon the avowry, and is refuſed, he ſhall have *detinue*. 2 *Inſtit.* 107.

In avowry for *damage feaſant*, defendant had a verdict, and adjudged that he ſhall have a *return. habend.* for the cattle, and a *ca. ſa.* for the damages; but if the party tender the coſts and damages, the ſheriff, after ſuch tender, ought not to execute the *return. habend.*

But if for want of ſuch tender the ſheriff doth execute the *return. habend.* and afterwards the coſts and damages are paid, a writ *ſi conſtare poterit* lies upon ſuggeſting, that the coſts, &c. are paid, and this is to redeliver the diſtreſs, and is called a writ *of reſtitution*. *Cro. Car.* 162. 3 *Salk.* 54.

Of prohibition.

AS all external jurisdiction, whether *ecclesiastical* or *civil*, is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of the jurisdiction prescribed them by the laws and statutes of the realm; and for this purpose a *writ of prohibition* was framed so early as the 3 *Edw.* 1. which *writ* issues out of the superior *common law courts*, to restrain all inferior courts, whether *ecclesiastical* or *temporal*, *maritime*, *military*, &c. upon a *suggestion* made in the superior court, that such inferior court hath assumed a greater or other power than was entrusted to it by law, or that it hath refused to allow of acts of parliament, or hath expounded them contrary to their true and proper exposition and intent, *&c. &c.*

If inferior courts exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges that give it, are in such superior courts punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the variety of the case. *Danv.* 52.

The writ of prohibition is to preserve the right of the king's crown and courts, and is intended for the ease and quiet of the subject; so that it is the wisdom and policy of the law to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every court. *Show. Par. Cas.* 63.

So that *prohibitions* do not import that the *ecclesiastical* or other inferior temporal court are *alia* than the king's courts; but signify that the cause is drawn *ad aliud examen* than it ought to be: and therefore it is always said in all *prohibitions* (be the court ecclesiastical or temporal to which it is awarded), that the cause is drawn *ad aliud examen contra coronam et dignitatem regiam.* 2 *Inst.* 602. *Rol. Rep.* 252. 3 *Bulf.* 120. *Palm.* 297.

From whence it iſſues.

THE ſuperior courts at *Weſtminſter*, having a ſuperintendency over all inferior courts, may, in all caſes of innovation, &c. award a prohibition: in this the power of the *King's Bench* has never been doubted. *F. N. B.* 53. 4 *Inſt.* 71.

Alſo the court of *Chancery* may award a prohibition, which may iſſue as well in vacation as in term time; but ſuch writ is returnable into *B. R.* or *C. B.* *Bro. Prob. pl.* 6. 4 *Inſt.* 81. *Will. Rep.* 43.

As the common law courts are not always open, if one is ſued in an inferior court for a matter out of the juriſdiction, the defendant, if it happen in *vacation time*, when only the *Chancery* is open, may move that court for a prohibition: but then it muſt appear by *oath* made, that the fact did ariſe out of the juriſdiction, and that the defendant tendered a foreign plea, which was refuſed; and if a prohibition has been granted out of *Chancery improvidè*, or without theſe circumſtances attending it, the court will grant a *ſuperſedeas* thereto. *Will. Rep.* 476. *pl.* 135.

As the juriſdiction of the court of *Common Pleas* is founded on *original writs* out of *Chancery*, it was formerly doubted whether it could, without count or plea depending therein, award a prohibition: but it has been determined by the unanimous ſenſe of all the *judges*, that this court may, upon a ſuggeſtion, grant prohibitions, to keep as well *temporal* as *eccleſiaſtical* courts within their bounds and juriſdictions; and that without any *original writ or plea* depending: the common law being in theſe caſes a prohibition of itſelf, and ſtanding inſtead of an *original*. *Bro. Prob. pl.* 6. *Noy*, 153. 12 *Co.* 58. 108. *Bro. Con. pl.* 3. 4 *Inſtit.* 99. 2 *Brownl.* 17. *Vaughan*, 157.

The grand ſeſſions in *Wales* may alſo ſend a prohibition, and write to the ſpiritual courts there, as well as the courts here may. *Sid.* 92. *Sed vide Cro. Car.* 341. *Jones*, 330. *Vau.* 411.

In *B. R.* and *C. B.* this difference hath been made, that in *B. R.* a prohibition may be awarded upon a bare ſurmiſe without any ſuggeſtion on record; but that for a prohibition out of *C. B.* there muſt be a ſuggeſtion on record, and therefore the latter is conſidered as the ſuit of the party, and in which he may be nonſuited, and is not diſcontinued by the demiſe of the king; but the former is only in nature of a commiſſion prohibitory, which is diſcontinued by the demiſe of the king. *Noy*, 77. *Palm.* 422. *Latch.* 114. But if an attachment iſſues upon ſuch prohibition, or the party puts in *bail*, then it becomes a private ſuit, not diſcontinued by the demiſe of the king; and after

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after ſuch proceeding the party may be nonſuit, but not before. *Palm.* 423. *Latch.* 114.

But *per Holt*, ch. juſt. *B. R.* a prohibition cannot be moved for, if it be inſiſted, till the ſuggeſtion be entered on record, *Salk.* 136.

So for want of a ſuggeſtion on record, the court of *B. R.* diſcharged the rule to ſhew cauſe why a *prohibition* ſhould not be awarded. *Hawkins, aſſignee of Wooldridge, a bankrupt*, againſt *Blaquire and others, aſſignees of Sampſon, Hil.* 20 *Geo.* 3.

It hath been ſaid, that the granting a prohibition is *ex debito juſtitiæ*; but the better opinion ſeems to be, that the awarding a prohibition is a matter *diſcretionary*, *i. e.* that from the circumſtances of the caſe, the ſuperior courts are at liberty to exerciſe a legal diſcretion herein, but not an arbitrary one in refuſing prohibitions, where in ſuch like caſes they have been granted; or where by the laws and ſtatutes of the realm they ought to be granted. *Salk.* 33. *pl.* 6. *Ld. Raym.* 220. 578. 586.

It hath been determined in the Houſe of Lords, that no *writ of error* will lie upon the refuſal of a prohibition; but when a *conſultation* is awarded, it is with an *idco conſideratum eſt*, and then a writ of error will lie, becauſe there is a judgment. *Ld. Raym.* 545. *Salk.* 136.

No prohibition can be had, unleſs the party is in danger by ſome ſuit actually depending; and therefore a prohibition cannot be granted before a libel, or appearance to a ſuit below. *Salk.* 35. *pl.* 8. *March.* 24, 25. For a prohibition *quia timet* does not lie. *Allen*, 56.

It is clearly agreed, that in all caſes where it appears upon the face of the libel, that the Admiralty or Spiritual Court, *&c.* have not a juriſdiction, a prohibition may be awarded, and is grantable *as well after as before ſentence*; for the ſuperior courts are to take care that the inferior courts keep within their due bounds. 2 *Inſt.* 602. 2 *Roll. Abr.* 318. *Noy*, 137. *Sid.* 65. *Cro. El.* 571. *Moor*, 462. 907. *Carth.* 463. *Skin.* 299. *pl.* 2. But *after ſentence* a prohibition ſhall not go, unleſs the want of juriſdiction in the court below appears upon the face of the proceedings. *Burr. Rep.* 4 *pt.* 2036—2040.

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WHERE the court has a natural juriſdiction of the thing, but is reſtrained by ſome ſtatute, as by 23 *Hen.* 8, for not citing out of the dioceſe, there the party muſt come before ſentence; for after pleading and admitting the juriſdiction of the court below, it would be hard and inconvenient to grant a prohibition. *Vide* the authorities *antea*, and *Cro. Car.* 97. 2 *Show.* 145. *pl.* 153. 155. *&c.* 2 *Salk.* 543. *pl.* 1. *Ld. Raym.* 27. *Salk.* 30. *Carth.* 33.

When a prohibition is moved for, the method is for the party to file a *ſuggeſtion* in court, ſtating the proceedings that have been had in the court below, and then ſuggeſting the reaſon why he prays the prohibition; and upon this the court grants a rule to ſhew cauſe why a prohibition ſhould not iſſue; and if upon ſhewing cauſe it appears to the court that the ſurmiſe is not true, or not clearly ſufficient to ground the prohibition upon, they will deny it; otherwiſe they will make the rule abſolute for a prohibition; or if the matter be doubtful, they will order the party to declare. *Hob.* 67.

The court will not grant a prohibition the laſt day of term, but on motion a rule may be obtained to ſtay proceedings till the enſuing term. *Latch.* 7. 2 *Ral. Rep.* 456.

The ſuggeſtion for a prohibition is to the following effect:

The form of a ſuggeſtion for a prohibition to the *bailiff* of a borough, to prohibit him from holding plea in a matter ariſing *extra juriſdictionem*.

"*Great Britain.* Be it remembered, that on ——— next after fifteen days of Saint *Martin*, in this ſame term, before the lord the king at *Weſtminſter*, comes *A. B.* in his proper perſon, and giveth the court of our lord the king here to underſtand, that *whereas* by a certain act of parliament, made at a parliament holden at *Weſtminſter* the twenty-fifth day of *April*, in the third year of the reign of the late king *Edward* the Firſt, it was (amongſt other things) ordained and eſtabliſhed by the authority of the ſame parliament, "Of great men and their bailiffs, and other (the king's officers only excepted unto whom eſpecial authority is given) which at the complaint of ſome, or by their own authority, attack others paſſing through their juriſdiction with their goods, compelling them to anſwer afore them upon contracts, covenants and treſpaſſes, done out of their power and their juriſdictions, where indeed they hold nothing of them, nor within the franchiſe, where their power is, in prejudice of the king and his crown, and to the damage of the people: it is provided, that

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that none from thenceforth ſo do; and if any do, he ſhall pay to him, that by this occaſion ſhall be attached, his damage double, and ſhall be grievouſly amerced to the king," as by the ſaid ſtatute (amongſt other things) it more fully appears: nevertheleſs, one *C. D.* not ignorant of the premiſſes, but contriving and intending the ſaid *A.* againſt the form of the ſtatute, unjuſtly to vex, oppreſs and weary, and to draw him into plea in the court of our lord the king, of record, of the borough of *Bridgenorth*, in the county of *Salop*, held in the ſaid borough, before the bailiff of the ſaid borough, in a certain action which had ariſen and accrued out of the juriſdiction of that court; and alſo the common law of the realm (to every ſubject of right due) ſo derogate from and abridge, and the due courſe of law to ſubvert, and the iſſues and profits which to the ſaid lord the preſent king thereof might happen, and which to his royal crown eſpecially belongeth to diminiſh, in the ſaid court of our ſaid lord the preſent king, of record there, held on —— in the nineteenth year of the reign of the lord the preſent king, before the bailiffs of the ſaid borough, according to the cuſtom of the ſaid borough, from time whereof the memory of man is not to the contrary, uſed and approved, levied his certain plaint againſt the ſaid *A.* in a certain plea of treſpaſs upon the caſe, to the damage of the ſaid *C. D.* of fifty pounds: and the ſaid *C. D.* by pretence of the plaint aforeſaid, in form aforeſaid levied and affirmed, then and there cauſed and procured him the ſaid *A.* paſſing within the juriſdiction of that court, to be attached and arreſted, and compelled the ſaid *A.* to appear in the ſaid court, and the ſaid *A.* of and upon the premiſſes unjuſtly conſtrained to anſwer. And thereupon in the ſame court, held on the day of in the nineteenth year of the reign aforeſaid, before the ſaid bailiffs of the ſaid borough, the ſaid *C. D.* upon his aforeſaid plaint did declare againſt the ſaid *A.* in manner and form following; that is to ſay, *C. D.* complains againſt *A. B.* (here inſert the declaration) *&c.* which ſaid plaint now remains in the ſaid court depending and undetermined, and there in the ſaid court is proſecuted by the ſaid *C.* "*Whereas*, in truth and in fact, the aforeſaid cauſe of action in the ſaid plaint and declaration mentioned, aroſe and accrued to the ſaid *C. D.* out of the ſaid borough of *Bridgenorth*, and out of the juriſdiction of that court; that is to ſay, at the pariſh of —— in the ſaid county of *Salop*, and not within the ſaid borough of *Bridgenorth*, or within the juriſdiction of that court. And whereas the ſaid *A.* holds nothing

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of them the ſaid bailiffs, or within the franchiſe or juriſdiction of that court. And whereas in fact the bailiffs of the ſaid borough, or any of them, never had or hath power to hold the plea aforeſaid, nor to hear and determine the ſaid plea as aforeſaid, ariſing and accruing out of the juriſdiction of the ſaid court, by the laws of this realm, nor by virtue of any letters-patent of the ſaid lord the preſent king, nor of any of his progenitors or predeceſſors, kings or queens of this realm, nor by any title of preſcription, from time whereof the memory of man is not to the contrary uſed and approved, or any otherwiſe howſoever; " *And although the ſaid A. all and ſingular the matters and things by him above ſuggeſted, hath pleaded in his diſcharge in the aforeſaid court* * before the aforeſaid bailiff of the ſaid borough, and there offered to verify and prove the ſame by undeniable teſtimony and proof; *nevertheleſs*, the bailiffs of the borough aforeſaid, the aforeſaid plea and allegation of the ſaid *A.* there to receive or admit altogether refuſed, and threatened to give judgment in the ſaid court, in the ſaid action, againſt the ſaid *A.* in contempt of our lord the preſent king, and to the great damage of the ſaid *A.* and contrary to the law of this realm, and alſo againſt the form of the ſtatute aforeſaid; and this the ſaid *A.* is ready to verify: *whereupon* the ſaid *A.* humbly imploring the aid and munificence of the court of our lord the preſent king, prays ſpeedy remedy, and a writ of our lord the preſent king of prohibition to be directed to the ſaid bailiffs of the ſaid borough, and other competent judges in that behalf; and alſo to the ſaid *C.* his counſellors, attornies, and ſolicitors, in this behalf whomſoever, to prohibit them and every of them, that they, or any of them, in the ſaid plea of treſpaſs, in any manner touching the ſame in the ſaid court, before the ſaid bailiffs of the ſaid borough, or any of them, to proceed ſhould not preſume, nor any further in that behalf ſhould attempt, which to the further derogation of the crown of his preſent majeſty, or to the contempt of the law, or the loſs or prejudice of the ſaid *A.* might in any wiſe turn, on pain of incurring the puniſhment due to violators of the law of this realm; but from all further proſecution againſt the

* *Note.* Where there is no *defectus juriſdictionis*, but only *triatipnis*, the defendant muſt plead it below, and have his plea diſallowed, before he can be entitled to a prohibition. But where there is a *defectus juriſdictionis*, the party has no occaſion to plead it below, before motion for prohibition.—Therefore in the above precedent given of a ſuggeſtion, there was no occaſion for that part of it.

ſaid

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ſaid *A.* in the ſaid court, before the bailiffs of the ſaid borough, or any of them, ſhould utterly deſiſt, and each and every of them ſhould deſiſt; and it is granted to him, *&c.*

The form of a ſuggeſtion for a prohibition to an *eccleſiaſtical* court on a libel there by a vicar againſt a pariſhioner for ſubtraction of tithes, ſetting forth that there is a *modus* in the ſaid pariſh, *&c.*

"*England.* Be it remembered, that on next after days from the day of *Eaſter*, in this ſame term, before our lord the king, at *Weſtminſter*, comes *A. B.* by his attorney, and gives the court here to underſtand and be informed, that *whereas* all and all manner of pleas, of and concerning any preſcriptions and cuſtoms whatſoever within this realm, and the cognizance of ſuch pleas, belong and appertain to the ſaid lord the king, and his royal crown, and to the common law, and in the courts of our ſaid lord the king, of record, ought and have always been accuſtomed to be tried and diſcuſſed, and not in any eccleſiaſtical court. And *whereas* on the 1ſt day of *January* 1779, the ſaid *A. B.* was, and from thence hitherto hath been, and ſtill is, ſeiſed in his demeſne as of fee, of and in divers, to wit thirty, acres of meadow, ſituate, lying and being, within the pariſh of ——— in the county of ——— and within the bounds, limits, and tytheable places thereof; and during the time aforeſaid, was poſſeſſed of divers cows and calves, within the ſaid pariſh, and the bounds, limits, and titheable places thereof. *And whereas* within the ſaid pariſh there are, and from time whereof the memory of man is not to the contrary, have been, certain cuſtoms and modes of tything, that is to ſay, one certain cuſtom, *&c.* [*inſerting the cuſtoms and moduſſes*, &c.]; *nevertheleſs*, one *C. D.* clerk, vicar of the pariſh of ——— aforeſaid, not ignorant of the premiſſes, but contriving unduly to aggrieve and oppreſs the ſaid *A. B.* againſt the due courſe of the law of this realm, and to draw the cognizance of a plea which belongs to our lord the king's temporal courts, and ought there to be tried, diſcuſſed, and determined, to another trial, on the day of 1779, drew the ſaid *A. B.* into a plea, and cauſed him to appear in the court Chriſtian, before the right worſhipful *J. C.* maſter of arts, vicar general, and principal of the epiſcopal or conſiſtorial court of ——— lawfully conſtituted, his ſurrogate, or ſome other competent judge in that behalf, by craftily and ſubtilly libelling againſt the

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the ſaid *A.* in the ſaid court Chriſtian—Firſt, that in the year, &c. [*ſtate the libel*]; and although the ſaid *A.* hath alledged and pleaded all and ſingular the matters above ſuggeſted and alledged in the ſaid court Chriſtian, in his diſcharge of and from the tithes, &c. and offered to prove the ſame by indiſputable evidence; yet the aforeſaid ſpiritual judges have altogether refuſed, and ſtill do refuſe, to admit or receive the ſame plea, allegation, or proof, and endeavour with all their might to compel the ſaid *A.* to pay the ſaid monies in the aforeſaid libel ſpecified, and daily threaten to condemn the ſaid *A.* of and upon the premiſſes, in contempt of our ſaid lord the king and his laws, to the great damage and injury of the ſaid *A.* and againſt the courſe of the law of this realm, and the cuſtoms and preſcriptions aforeſaid; all which ſaid premiſſes the ſaid *A.* is ready to verify and prove, as the court of our lord the king here ſhall direct; *whereſore* the ſaid *A.* imploring the aid and aſſiſtance of this court here, prays relief, and his majeſty's writ of prohibition to be directed to the ſaid official principal of the epiſcopal conſiſtorial court of ——— aforeſaid, his ſurrogate, or other competent judge in this behalf, to prohibit them and every of them, that neither they nor any of them do any further hold pleas in the ſaid ſpiritual court, before them or any of them, touching the premiſſes aforeſaid, or any part thereof, &c.

For other forms, reſpecting other matters, ſee the books of entries.

From various books and reports, the force, effect, and validity of agreements for *tythes*, whether ſuch agreements are by indenture or *parol*, appears to be a very unſettled point. And it is ſaid to be the conſtant practice of the courts at *Weſtminſter*, not to grant *prohibitions* upon the ſuggeſtions of ſuch agreements, but to leave it to the ſpiritual court to determine: and if the party thinks himſelf there aggrieved, he may appeal. And this ſeems to hold ſtill, as to ſuch *parol* leaſes under the term of three years; for if they be above three years, then *by the ſtat. of frauds and perjuries*, they are made to have the force only of leaſes at will; and if under three years, yet by that ſtatute there muſt be yearly reſerved two thirds, at leaſt, of the full improved value of the thing demiſed. *Comp. Incumb.* 339, 340. Vide *Bac. Abr.* 3 *Vol.* 336, &c.

Of

Of proving the SUGGESTION, in what Caſes neceſſary, and at what Time.

IF the ſuggeſtion for a prohibition is to ſtop a ſuit commenced in the eccleſiaſtical court for ſubtraction of *tythes or other eccleſiaſtical dues*, *the* 14 *ſect. of the* 2 *and* 3 *Edw.* 6. *c.* 13. requires, "That if any party do ſoe for any prohibition in any "of the king's courts, that then the ſame party, before any "prohibition ſhall be granted to him or them, ſhall bring and "deliver to the hands of ſome of the juſtices or judges of the "ſame court where ſuch party demandeth the prohibition, the "very true copy of the libel depending in the eccleſiaſtical "court, concerning the matter whereupon the party demand-"eth the prohibition, ſubſcribed or marked with the hand of "the ſame party; and under the copy of the ſaid libel ſhall be "written the ſuggeſtion, wherefore the party ſo demandeth "the ſaid prohibition: And in caſe the ſaid ſuggeſtion, *by two* "*honeſt and ſufficient witneſſes at the leaſt*, be not proved true in "the court where the prohibition ſhall be ſo granted, *within* "*ſix months* next following after the ſaid prohibition ſhall be ſo "granted and awarded, that then the party that is letted or "hindered of his or their ſuit in the eccleſiaſtical court by "ſuch prohibition, ſhall, upon his or their requeſt and ſuit, "without delay, have a conſultation granted in the ſame caſe "in the court where the ſaid prohibition was granted; and "ſhall alſo recover *double coſts and damages* againſt the party "that ſo purſued the ſaid prohibition, *&c.*"

As this ſtatute refers to the ſtatutes 27 & 32 *Hen.* 8. which extends to tythes and offerings generally, all ſuch tythes and church duties as are mentioned in thoſe ſtatutes are as much within this act as if enumerated. 2 *Inſtit.* 662. *Comp. Incumb.* 600. *Dyer*, 170. *b.*

And therefore it extends to prohibitions to ſuits for ſmall tythes as well as great. *Yelv.* 102. *Ld. Raym.* 1172.

So a ſuggeſtion of a *modus decimandi* ought to be proved within *ſix months*, being within this act. *Noy*, 148. *Yelv.* 104.

So where the party ſuggeſted, that he was to pay ſo much upon an *arbitrament*, being the ſame as a *modus decimandi*. *Roll. Rep.* 55,

But there needs no proof of the ſuggeſtion where the ſuit is for tythes contrary to common right, or where the contract of the party is ſuggeſted. *Yelv.* 104. 119. 2 *Leon.* 29. *Hetl.* 145. 2 *Keb.* 134. *Lit. Rep.* 297.

The ſuggeſtion need not be proved ſtrictly,—proof by hearſay is ſufficient. *Palm.* 397.—or that it is ſo by common fame. *Noy*, 28.—nor with preciſe certainty as to all its circumſtances; but that if it be proved in ſubſtance, or in ſuch a manner

Of proving the SUGGESTION, in what Caſes neceſſary, and at what Time.

manner as to ſhew that the eccleſiaſtical court hath not juriſdiction, it is ſufficient.

And the ſuggeſtion may be proved by perſons, although ſuch perſons at the trial may not be able and competent witneſſes. *Mich.* 27 *Car.* 2. *C. B. Sharp* v. *Hobarti.*

If a ſuggeſtion conſiſts of two parts, one witneſs to one part, and another to the other part, it is ſufficient. *Vent.* 107.

If the party is ordered to declare in *prohibition*, the proof of the ſuggeſtion need not be within *ſix months*, becauſe the proof in ſuch caſe is to be made at the trial of the cauſe. *Caſ. in C. B.* 158.

The *ſix months* in this caſe is according to the *calendar*, and not *lunar* months, for this is a computation which concerns the church. *Heb.* 179. 2 *Mod.* 58. *Lit. Rep.* 19. And the *ſix months* commence from the *teſte* of the writ of *prohibition*, not from the time of the rule for awarding it. 2 *Ld. Raym.* 1172. 2 *Salk.* 554. *pl.* 20. 656. *pl.* 2.

And if the ſurmiſe be proved before one of the judges within the ſix months, it is ſufficient, although it is not recorded till after the ſix months by the court. *Noy*, 30. But it muſt be entered in the office. 2 *Show.* 308.

And proof which is not ſufficient, may be ſupplied with better within the ſix months. *Lit. Rep.* 155.

The plaintiff had obtained a rule to ſhew cauſe why a *conſultation* ſhould not go, for want of the plaintiff's proving his ſuggeſtion within the *ſix months*, and why the plaintiff ſhould not pay double coſts. Upon cauſe ſhewn it appeared, that the declaration had been, by rule, ordered to be made agreeable to the proceedings in the ſpiritual court, and thereupon a prohibition to iſſue. And the court being of opinion, that the time for proving the ſuggeſtion ought to be computed from the time of the amendment, and not farther back, the ſix months were not expired. So the rule was diſcharged. *Barnes*, 428.

A writ of *prohibition* had been granted on motion, and plaintiffs not having proved their ſuggeſtion according to the ſtatute 2 & 3 *Edw.* 6. to be true within *ſix months*—It was moved, that a writ of *conſultation* might be awarded for defendant, plaintiffs not proving their ſuggeſtion to be true within the limited time; and that plaintiffs might, according to the direction of the ſtatute, pay defendant *double coſts*. It was doubted, whether plaintiffs, being adminiſtrators, ought to pay coſts. But the court ſeemed to think, that defendant was intitled of courſe to a writ of *conſultation*. *Sed Cur' advis'* as to both points. *Barnes*, 130.

Of

Of entering the Proof of the SUGGESTION.

WHEN the party has proved his ſuggeſtion before a judge, according to the 14th *ſect. of the* 2 & 3 *of Edw.* 6. *c.* 13. an entry of ſuch proof muſt be drawn out in order to be entered of record in court, which is to be done in the following manner, after the ſuggeſtion and the award of the writ of prohibition.

" And the writ of the prohibition of the lord the king is granted to him, *&c.*"

AFTERWARDS, that is to ſay, on the day of in the twentieth year of the reign of our ſovereign lord *George* the Third, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, *&c.* at in the county of before [the judge] comes the ſaid *A. B.* in his proper perſon, and to verify, teſtify, and prove his ſuggeſtion aforeſaid, and all and every matter and thing contained in the ſame ſuggeſtion on the part of the ſaid *A. B.* to be proved, produceth three good, lawful, and ſufficient witneſſes, to wit, *O. P.* of in the county aforeſaid, huſbandman, and aged about twenty-four years, or thereabouts; *Q. R.* of the ſame place, labourer, aged ſixty years or thereabouts; and *S. T.* of the pariſh of in the ſaid county, farmer, aged forty years and upwards, before the ſaid juſtice at aforeſaid, according to the form of the ſtatute in ſuch caſe made and provided: which ſaid witneſſes ſo as aforeſaid produced by the ſaid *A. B.* being then and there ſworn upon the holy *Evangeliſts*, to depoſe the truth of and upon the premiſſes ſpecified in the aforeſaid ſuggeſtion, ſay and depoſe, and each of them ſeverally upon his oath ſaith and depoſeth in manner and form following, that is to ſay, the ſaid *O. P.* for himſelf, upon his oath ſaith and depoſeth, that, *&c.* [Here enter the proof of what he ſwears.] And the ſaid *Q. R.* for himſelf upon his ſaid oath ſaith and depoſeth, that, *&c.* [Enter what he ſwears to.] And the ſaid *O. P.* and *Q. R.* for themſelves ſeverally upon their ſaid oath ſay and depoſe, that, *&c.* [Enter what they both ſwear to.] And the ſaid *S. T.* for himſelf, upon his ſaid oath, ſaith and depoſeth, that, *&c.* [The part he ſwears to.] Which ſaid depoſitions taken before the ſaid [the name of the judge], in form aforeſaid, the ſaid juſtice afterwards, to wit, in *Michaelmas* term, in the nineteenth year of the reign of our ſaid lord the now king, delivered by his own proper hands, into the court of our ſaid lord the king *of the Bench*, here to be enrolled of record.

Sworn the day of in the year of our Lord 1780. } By me ——

Where

Where the SUGGESTION muſt be verified by an AFFIDAVIT.

IN ſome caſes the courts require an *affidavit* to be made on application for a *prohibition*, to ſupport the *ſuggeſtion*.

Per Holt ch. juſt. *B. R.* in *Godfrey* v. *Llewellin*, 11 *W.* 3, the biſhop of *St. David*'s caſe. Where the matter ſuggeſted for a prohibition appears upon the face of the libel, we never inſiſt upon an *affidavit*; but unleſs it appear upon the face of the libel, or if you move for a prohibition as to more than appears upon the face of the libel, to be out of their juriſdiction, you ought to have an *affidavit* of the truth of your ſuggeſtion. *Salk.* 549. *pl.* 3.

Upon motion for a prohibition, there muſt be an *affidavit* that the matter ſuggeſted to have been pleaded was pleaded below in the ſpiritual court, and diſallowed. Vide *Ld. Raym.* 1211. for otherwiſe, any one might come and ſuggeſt a falſe fact, and ſo ouſt the ſpiritual court of their *juriſdiction*.

In *Hynes* v. *Thompſon* [mentioned by *Aſton juſt.* in *Buggin* v. *Bennet*. *Burr.* 4 *pt.* 2039, 2040.], Lord ch. juſt. *Lee* laid down the rule to be, "That if you move for a prohibition upon any thing not appearing upon the face of the proceedings, you ought to have an affidavit of the truth of the ſuggeſtion." And he cited *Godfrey* and *Llewellin*, 2 *Salk.* 549. in point; and 2 *Salk.* 551. *pl.* 13. where *Holt* ch. juſt. laid down the law to be, "That wherever the matter, which you ſuggeſt for a prohibition is *foreign* to the libel, you muſt plead it below, before you can have a prohibition; otherwiſe, where the cauſe of prohibition appears *upon* the libel." And lord ch. juſt. *Lee* ſaid, in that caſe of *Hynes* v. *Thompſon*, that he thought it muſt either be pleaded "that there was ſuch a cuſtom," or an *affidavit* of it. And Mr. juſt. *Chapple* hinted, that prohibitions had been too eaſily granted; and was of opinion, that there ought to have been an affidavit to verify the ſuggeſtion.

In *Driver* v. *Colgate* [mentioned alſo by *Aſton* juſt. in the ſame caſe of *Buggin* v. *Bennet*, *Burr.* 4 *pt.* 2039, 2040], the court held, that there was no neceſſity to *plead* it below, in caſes of prohibition for *words* ſpoken where they are by the cuſtom actionable, as there is in caſe of a prohibition or ſuggeſtion of a *modus*. For in the former caſe, they cannot go on if the ſuggeſtion be true; but in the latter of a *modus*—if the *modus* be admitted in the ſpiritual court, they may go on, becauſe the juriſdiction continues.

In all other caſes the court laid down a general rule, "that the matter muſt either be *pleaded* below, or verified by *affidavit*." Vide *Burr. Rep.* 4 *pt.* 2040.

Where the SUGGESTION muſt be verified by an AFFIDAVIT.

As in caſe for a prohibition to the conſiſtory court of *London*, in a cauſe for calling a woman "*whore*" in *London*, there muſt be an affidavit of the *cuſtom*, and alſo that the words were ſpoken there. *Theyer* v. *Eaſtwick*. *Burr*. 4 *pt*. 2032.

In *C. B.* on ſhewing cauſe why a prohibition ſhould not be granted, it was objected, that no affidavit was filed, whereby the libel whereupon the plaintiff had moved, appeared to be a true copy. *Per Cur*. The objection is good. Rule diſcharged. *Eaglesfield* v. *Anderſon*. *Barnes*, 427.

On a rule to ſhew cauſe why an *attachment* ſhould not be granted againſt the mayor of *Marlborough*, for refuſing to accept the defendant's plea in his court, it was held not to be ſufficient for a defendant in a court below to bring his plea into court, and offer to make oath of the truth of it; but that he muſt tender his plea with an affidavit annexed of the truth thereof, and that this muſt be done before a general imparlance; but that he might have prayed a *ſpecial imparlance*, and then have come to the next court and pleaded. It was alſo held, that the proper way of proceeding was not by *attachment*, but that a *prohibition* ſhould have been moved for; and ſo the rule for an attachment was diſcharged. *Vokins* v. *Cull*. *B. R. Hil*. 12 *Geo*. 2.

Of

Of granting a PROHIBITION abſolutely, or HOC USQUE only.

PROHIBITIONS are granted either abſolutely, or *hoc uſque* only till ſuch an act be done; the firſt of theſe is peremptory, and ties up the inferior juriſdiction till a *conſultation* is awarded; the ſecond is *ipſo facto* diſcharged upon complying with the act, and that without any *writ of conſultation*. 6 *Mod.* 308.

When a prohibition is moved for becauſe a copy of the libel is denied, the court requires that oath ſhould be made of the denial, and the prohibition is only *quouſque* the copy be delivered. *Vent.* 252. 2 *Salk.* 553. *pl.* 19.

The ſtat. 2 *Hen.* 5. *ſtat.* 1. *c.* 3. requires a copy of the *libel* in the eccleſiaſtical court to be given to the party ſued there. But as this ſtatute extends only to the *eccleſiaſtical courts*, a prohibition was denied to be granted to the *admiralty* court, upon a ſuggeſtion that they refuſed to give the party ſued there a copy of the libel. *Ld. Raym.* 442.

A prohibition *quouſque* they give a copy of the libel, if it be granted before any libel exhibited, does not bind them from exhibiting any libel; but after, they ſhall not proceed till they give a copy of it. 6 *Mod.* 308.

It was formerly held by all the judges, that when there was a proceeding *ex officio* in the eccleſiaſtical court, they were not bound to give the party a copy of the articles: but the law is otherwiſe; for in ſuch caſes, if they refuſe to give a copy of the articles, a prohibition ſhall go *quouſque* they deliver it. *Ld. Raym.* 991.

In *C. B.* a rule was made for civilians to be heard on both ſides in relation to a prohibition. Dr. *Lee* attended to argue againſt the prohibition; but none would attend to argue for it, as by affidavit appeared. *Per Cur.* We ought to hear civilians on both ſides, or not at all. Enlarge the rule: perhaps, when our opinion is known, a doctor may attend on the other ſide. Afterwards no civilian attending to argue for the prohibition, the court would not hear Dr. *Lee* againſt it. *Barnes*, 428.

A prohibition is not grantable the laſt day of term, but on motion, a rule may be obtained to ſtay proceedings till the enſuing term. *Latch.* 7. 2 *Roll. Rep.* 456.

But a prohibition to an eccleſiaſtical court was granted the laſt day of term on motion, leave having been obtained the day before, "to move it then." *Burr. Rep.* 4 *pt.* 1922.

Of declaring in Prohibition, &c.

THE court ſeldom awards a *prohibition* upon the motion, but generally grants a rule, *niſi*, or that the adverſe party ſhould ſhew cauſe why it ſhould not be granted. *Cro. El.* 160. 94. 5 *Mod.* 247. *Ld. Raym.* 86. 236. *Wil. Rep.* 71. *pl.* 21.

Alſo in nice and difficult caſes it is uſual to direct the plaintiff to declare in *prohibition*. *Cro. El.* 736. 4 *Mod.* 151. *Lev.* 125. *Ld. Raym.* 88. — and ſo proceed to iſſue, that the merits of the cauſe may be brought before them with the greater exactneſs, and the court thereby be the better enabled to judge of the reaſonableneſs of granting or refuſing the writ. *Stil. Pract. Reg.* 43. *F. N. B.* 44.

When the court inclines to grant the motion for a prohibition, the defendant has a ſort of right to inſiſt that the plaintiff ſhall declare; but where the court inclines againſt the motion, the plaintiff has no ſuch right, for there might be judgment by default, and the court be obliged to prohibit againſt their own opinion; and it is no injury to the plaintiff, as he may apply to another court. *The King* v. *the biſhop of Ely. Mich.* 30 *Geo.* 2.

So it appears, that leave to declare in prohibition is only granted when the court inclines to prohibit; not when it inclines to the contrary. *Vide* 1 *Blackſt. Rep.* 81.

The court is not obliged to give direction for ſuch declaration, but are abſolute judges of the ſufficiency or inſufficiency of the ſuggeſtion. *Leon.* 281.

On ſhewing cauſe againſt a *prohibition*, the court made the rule abſolute, with a direction that the plaintiff ſhould declare in prohibition. He tendered a declaration, but the defendant refuſed it, and applied to ſtay the proceedings, as being willing to ſubmit. The other inſiſted he had a right to go on, and ſo get the *coſts* of the motion, which he could not otherwiſe have; but the court ſtayed the proceedings without coſts; ſaying, the direction to declare was in favour of the defendant, who might waive it. *Gegge* v. *Jones. Stra.* 1149. [*Vide* the ſtatute 8 & 9 *W.* 3. *c.* 11. *ſ.* 3. which gives coſts in prohibition upon plaintiff's obtaining judgment, or any award of execution after *plea pleaded or demurrer joined*]; but the plaintiff can recover no coſts in prohibition, unleſs he has execution after *plea or demurrer* and judgment for him: but then after ſuch judgment and execution, after plea or demurrer, the coſts ſhall be taxed from the ſuggeſtion, ſo as to take in the motion. *Wills* v. *Turner. Hil.* 2 *Geo.* 2. *C. B.*

Where the party is ordered to declare in prohibition, he ought not to take out the writ, but ſerving the other ſide with a

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rule is ſufficient, and if in that ſuit he obtain judgment, the judgment is *ſtet prohibitio*, otherwiſe it is *quod eat conſultatio*; therefore if the party be excommunicated, the mandatory part of the writ to abſoil the party is not to be obeyed till after trial had. *The dean and biſhop of Wells. Mich.* 25 *Geo.* 2.

It was at the defendant's inſtance made part of the rule whereby a writ of prohibition was granted, that the plaintiff ſhould declare in prohibition. Defendant afterwards demanded a declaration, and threatened *a nonpros* for want thereof. Whereupon a declaration was prepared: and when it was ready, he was told by defendant's agent that he need not deliver it; but as he had been at the trouble and expence in preparing it, he delivered the ſame, and called for a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the ſpiritual court after the prohibition, gave a rule to reply, and demanded a replication. Whereupon plaintiff applied to the court, and obtained a rule for defendant to ſhew cauſe, why he ſhould not pay the plaintiff's coſts of the proceedings in prohibition. Which rule was made abſolute. The court looked on the plea to be a ſham nugatory plea, and not to the merits of the cauſe: the allegation, that defendant has proceeded contrary to the prohibition, is and muſt be put into every declaration of this kind: but whether he has ſo proceeded, or not, is totally immaterial. The ſtat. 8 & 9 *W.* 3. *c.* 20. *ſ.* 3. gives coſts after plea or demurrer: but this is not a plea within the ſtatute. *Seed* v. *Wolfenden. Barnes*, 148.

In caſes of tythes and ſuch ſort of matters where many things are in controverſy, itis very frequent to order the prohibition to ſtand as to part, and a *conſultation* to go as to the other part.

If the declaration in prohibition varies from the ſuggeſtion, this is naught, and a *conſultation* ſhall be awarded. 7 *Mod.* 113. *Leon.* 128. For the ſurmiſe is as the writ.

The declaration in prohibition is founded upon an *attachment* for a contempt, and therefore the declaration in prohibition is a *qui tam* declaration, for it ſuppoſes a contempt to the king in proceeding after the writ delivered. 12 *Co.* 61. But the contempt is but form, and the jury need not give any verdict about it. *Stra.* 482.

Where an iſſue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they ſhall give no more than *one ſhilling* damages, for it is in nature of an iſſue to inform the conſcience of the court. *Carter* v. *Leeds. Mich.* 2 *Geo.* 2. But after the plaintiff has had judgment *quod ſtet prohibitio*

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prohibitio, he may bring his action upon the caſe, and recover the damages he has ſuſtained.

If the jury, upon an iſſue joined in a prohibition *de modo decimandi*, find a different *modus* than that alledged by the plaintiff, yet the defendant ſhall not have a conſultation; becauſe it appears that he ought not to ſue for tythes *in ſpecie*, there being a modus found. *Vent.* 32.

The declaration ought to ſhew a place where the defendant proceeded, after the prohibition ſerved; otherwiſe, the plaintiff ſhall not have judgment, though the writ of enquiry finds damages. 1 *Vent.* 348. 350. *Ray.* 387. 2 *Jones*, 128. 2 *Show.* 145.

Two perſons cannot join in the declaration, where the cauſe of complaint is ſeveral. *Cro. Car.* 162.

If the libel be againſt ſeveral pariſhioners, who all inſiſt upon the ſame *modus*, they cannot join, but muſt have ſeveral prohibitions. *Yel.* 128. *R. Raym.* 425.

If there appears cauſe for a prohibition, there ſhall not be a conſultation, though the declaration be defective for want of form; as becauſe there is not the *profert* of a deed, or letters-patent. *Per Coke.* 1 *Rol.* 332.

After a rule given to declare in prohibition, the defendant may ſubmit and ſtay proceedings. *Stra.* 1149.

The declaration in prohibition was ordered to be amended by a judge, but the amendment not being warranted by the ſuggeſtion, or the acts of the ſpiritual court, the order was diſcharged. *Barnes*, 7.

Since the 8 & 9 *W.* 3. *c.* 10. giving plaintiff in prohibition, obtaining judgment, or any award of execution after plea or demurrer, his *coſts*, it has been held, that theſe coſts commence from the *ſuggeſtion*, which is taken to be the commencement of the ſuit, in lieu of an original writ in prohibition; and if a feigned iſſue is directed, and found in plaintiff's favour, he ſhall have the coſts of that too. *Palmer* v. *Williams*, *Clerk*. *Barnes*, 130.

The ſtat. 8 & 9 *W.* 3. extends only to caſes after plea pleaded, or demurrer joined; but if there be judgment by default, and the plaintiff have damages on a writ of inquiry, for the contempt in proceeding after the prohibition delivered (which is confeſſed by the default) he will be entitled to coſts at the common law. However, as this part of the declaration is no more than *form*, coſts are allowed only from the time of the rule for prohibition. *Sir E. Bettiſon* v. *Dr. Hinchman*. *Mich.* 7 *Geo.* 1. *C. B.*

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After a verdict for defendant in *prohibition* as to part, the queſtion was, whether he ſhould be allowed coſts purſuant to the *ſtatute Will.* 3. or not? *In quare impedit* if defendant has judgment, a writ is awarded to the biſhop: in *replevin*, a writ of *return. habend.* and coſts are given to the avowant, in ſome caſes, by the ſtat. 21 *Hen.* 8. In *prohibition*, by 4 *Jac.* 1. a conſultation is given, and ſince the ſtat. *Will.* 3. coſts, &c. if verdict, &c. paſs againſt the plaintiff. Rule that judgment be entered, for a conſultation as to part, and for coſts. The *poſtea* was agreed to be altered, with reſpect to finding that plaintiff proceeded in the ſpiritual court after the writ of prohibition delivered to him, which is material. *Malton qui tam* v. *Aſkham & al.* *Barnes*, 138.

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IF a prohibition be granted without notice to the other party, and upon motion it appears that there was no cauſe for it, the court will grant a *conſultation* *, without putting him to declare upon the prohibition. *Cro. Car.* 97.

So, after a prohibition granted, if upon trial the matter be found for the defendant, generally, a *conſultation* ſhall go.

So if the matter found for the defendant varies in words, but not in ſubſtance, from the ſuggeſtion; as if the ſuggeſtion be, that *two thirds of the tythes* belong to the plaintiff, and the verdict is *two entire parts of all tythes.*

So if there be a material variance between the ſuggeſtion for a prohibition, and the libel in the ſpiritual court, there ought to be a *conſultation*; for the prohibition ought to be founded upon the libel; as if the libel be for tythes of corn, and a *modus* be ſuggeſted for tythes of hay, upon demurrer to the declaration in prohibition, a *conſultation* ſhall go. *Yel.* 79.

So if there be a variance in quantity, as if the libel be for two hundred faggots of wood, and the ſuggeſtion be for twenty only. *Yel.* 79.

So after a prohibition granted, if it appears that the ſpiritual court has conuſance for part, a *conſultation* ſhall go *quoad*, &c. 12 *Co.* 44.

So if, after a prohibition granted, it be not ſerved till ſentence and appeal, it cannot be afterwards uſed. *Cro. Jac.* 429.

But a *conſultation* ſhall not be granted except in term. 12 *Co.* 41.

Nor by a judge, but only in court. *Ibid.*

Nor after a declaration upon a prohibition, it ſhall not be granted upon motion before *plea* or *demurrer*. *Cro. Car.* 238.

Nor ſhall a *conſultation* go, where a verdict is found for the defendant, if it appears upon the whole matter that the ſpiritual court has no conuſance; as if a prohibition be upon a ſuggeſtion, that all lands in *A.* are diſcharged by a *modus*, and there is a verdict for the defendant, becauſe it is found that all, except *ten acres*, are within the *modus*; yet a *conſultation* does not go for ſuch miſtake in the iſſue, if the libel was not for tythes of the ten acres. 2 *Rol.* 320. *l.* 5. 15. *Hob.* 192.

So if the ſuggeſtion was of unity, *ratione cujus* he ſhall be diſcharged, and a verdict finds that he ſhall not be diſcharged

* A writ of *conſultation* is ſo called, becauſe, upon deliberation and conſultation had, the judges find the *prohibition* ill founded; and therefore by this writ, they return the cauſe to its original juriſdiction, to be there determined.

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ratione inde; though it be againſt the plaintiff, yet being impertinent, for the fact to be tried was, whether there was an unity, *&c.* a *conſultation* does not go? 2 *Rol.* 320. *l.* 35. 11 *Co.* 15.

So, though there be an immaterial variance between the ſuggeſtion and the libel, a *conſultation* does not go: as if the ſuggeſtion be for a total diſcharge upon the ſtat. 31 *Hen.* 8. and recites the libel to be for twenty faggots, where it was for two hundred; for it was not material for what quantity the libel was, when the plaintiff claims a diſcharge for the whole. *Yel.* 75.

So if the ſuggeſtion varies in quantity from the libel, if it be conformable to the copy of the libel delivered by the ſpiritual court, this variance ſhall not be a ground for a *conſultation.* 2 *Rol.* 329. *l.* 45.

A *writ of conſultation* is to the following effect:

GEORGE the Third, by the grace of *God*, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth. To the right *worſhipful J. C. maſter of arts, vicar general, and principal official of the epiſcopal or conſiſtorial court of* —— &c. Whereas *C. D.* lately in the court chriſtian before you impleaded *A. B.* by the name and deſcription of *A. B.* of the pariſh of —— in the county of *Devon*, for this, that by the laws, *&c.* [Here ſet forth the ſubſtance of the libel] as by the libel of the ſaid *C. D.* amongſt other things more fully appears. And whereas the ſaid *A. B.* has lately proſecuted and cauſed to be directed to you our certain prohibition, out of our court, before our juſtices at *Weſtminſter*, that you ſhould no farther hold the plea aforeſaid, in the court chriſtian aforeſaid, before you or any thing farther in that behalf attempted, by pretence of which our ſaid prohibition you have from thence hitherto delayed, and yet do delay further to proceed in the cauſe aforeſaid, as we have underſtood, to the great damage of the ſaid *C. D.* and to the manifeſt prejudice of the eccleſiaſtical liberty.—Wherefore the ſaid *C. D.* hath in our court, *before our ſaid juſtices at Weſtminſter*, humbly beſought us to grant him our aid and aſſiſtance in this behalf; and we favourably conſenting to the petition of him the ſaid *C. D.* and being unwilling that the cogniſance, which to the eccleſiaſtical court in this behalf belongs, ſhould be further delayed by ſuch falſe and ſubtle aſſertions; becauſe in our ſaid court, before our ſaid juſtices at *Weſtminſter*, it is in ſuch manner proceeded, that it is conſidered by the ſame court, that the ſaid *C. D.* may have our

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our writ of conſultation to the court chriſtian aforeſaid, our ſaid writ of prohibition to the contrary thereof notwithſtanding, whereof the ſaid *A. B.* is convicted, as it appears to us on record. We therefore being unwilling that the ſaid *C. D.* ſhould be in any wiſe injured in this behalf, ſignify to you, and command, that you may in that cauſe lawfully proceed and further do what you ſhall know to belong to the eccleſiaſtical court, our ſaid prohibition to the contrary thereof before to you directed in any wiſe notwithſtanding.

Witneſs Sir *William de Grey*, knight, at *Weſtminſter*, the day of, *&c.*

When the court grants the writ of *prohibition*, ſuch writ is not abſolutely final and concluſive, even in ordinary caſes. For though the ground be a proper one in point of law, for granting the *prohibition*, yet, if the *fact* that gave riſe to it be afterwards falſified, the cauſe ſhall be remanded to the prior juriſdiction.—If for inſtance, a *cuſtom* be pleaded in the ſpiritual court, a *prohibition* ought to go, becauſe that court has no authority to try it; but if the fact of ſuch a cuſtom be brought to a competent trial and be there found falſe, a writ of *conſultation* will be granted. And for this purpoſe it is, that the party prohibited may appear to the *prohibition*, and take a declaration (which muſt always purſue the ſuggeſtion), and ſo plead to iſſue upon it; denying the contempt, and traverſing the cuſtom upon which the *prohibition* was grounded: and if that iſſue be found for the defendant, he ſhall then have a *writ of conſultation*.

Where a PROHIBITION may be granted after a CONSULTATION awarded, and where not, and of Diſobedience to the Writ of PROHIBITION.

BY the 50 *Edw.* 3. *c.* 4. "It is ordained and ſtabliſhed, That where a conſultation is once duly granted upon a prohibition made to the *judge of the holy church*, that the ſame judge may proceed in the cauſe by virtue of the ſame conſultation, notwithſtanding any other prohibition to him thereupon delivered: Provided always, that the matter in the libel of the ſaid cauſe be not engroſſed, enlarged, or otherwiſe changed."

Judge of holy church, means ſpiritual judge; and therefore this ſtatute extends not to the court of *admiralty*. 2 *Brownl.* 35.

Same judge, means eccleſiaſtical judge in general, or perſon competent, and not to the ſame individual perſon. *Pop.* 159. *Palm.* 418. *Latch.* 6. 75.

This ſtatute hath been conſtrued to extend to thoſe caſes only, where a *conſultation* hath been lawfully granted; that is, upon the right and merits of the thing in queſtion, and not to ſuch caſes where, for defect of form, miſpriſion of a clerk, miſpleading an act of parliament, *&c.* conſultations have been awarded. 2 *Brownl.* 26. 247. *Leon.* 130. 3 *Bulſt.* 182. *Moor*, 917.

And therefore regularly, where a conſultation was awarded upon the merits, the party ſhall not have another prohibition upon the ſame ſuggeſtion:

Though he appeals, and then prays another prohibition. *R. Pop.* 159. *Lat.* 6. 1 *Rol.* 378. *Moor*, 919.

Though the conſultation be granted by another court. *Cro. El.* 277.

And though he varies in the *modus* upon which the former prohibition was had. 1 *Rol.* 378.

But if a conſultation was awarded for want of form in the ſuggeſtion, or proceeding thereon, another prohibition may be allowed. *Cro. Car.* 208.

So if the conſultation was awarded for want of proof of the ſuggeſtion within the *ſix months*, purſuant to the ſtatute 2 & 3 *Edw.* 6. the plaintiff is not precluded, but may bring another prohibition [but then he muſt pay *double coſts*, according to the ſtatute, *Carth.* 463.], for this ſtatute of *Edw.* 3. goes to the ſuggeſtion made upon the ſame libel, and to a conſultation duly granted, and not to the caſe of not having witneſſes ready to prove the ſuggeſtion through negligence. But it was ſaid by *Holloway* juſt. that after a conſultation awarded for not proving his ſuggeſtion, *&c.* the party ſhall be for ever barred from having another prohibition on the ſame libel. *Comb.* 63.

But

Where a PROHIBITION may be granted after a CONSULTATION awarded, and where not, and of Diſobedience to the Writ of PROHIBITION.

But if, after a conſultation for want of proving his ſuggeſtion, the party appeals, there may be another prohibition to the court, to which the *appeal* was, upon the ſame ſuggeſtion. 2 *Rol.* 500.

So if after a conſultation the libel is enlarged or changed. 2 *Rol.* 207.

So if a conſultation goes for a *collateral* matter, as if the plaintiff was nonſuited. *Com. Dig.* 4 *Vol.* 484. *But. Keb.* 286. —If upon the trial of a ſuggeſtion the plaintiff be nonſuit, no new prohibition ſhall be granted, although the nonſuit was occaſioned for want of ſome of the plaintiff's witneſſes, who were to prove the truth of the ſuggeſtion, and who were neceſſarily obliged to be abſent.

But where the ſuggeſtion was for a *modus* of tythe of lambs in the pariſh, and a conſultation went, another prohibition ſhall go upon a ſuggeſtion of the ſame *modus* in a *particular farm*. 2 *Vent.* 47. This caſe is reverſed there.

So if a conſultation goes, and there be afterwards a new libel for the ſame ſpecies of tythes in another year, a prohibition ſhall go upon the ſame ſuggeſtion as was tried before. *Yel.* 192.

And if a conſultation goes, and the party againſt whom appeals; the appellee may have a prohibition, though the *appellant* cannot have it. *Pop.* 159.

So if, after a conſultation, the plaintiff pleads the ſame matter (which was ſuggeſted and found againſt him at common law) in the ſpiritual court, which is accepted, and proceeds there for a trial, the former defendant may have a new prohibition; for they cannot try, in the ſpiritual court, a matter determined at a trial at law, which was proper to be there tried, as if a diſcharge within. 31 *Hen.* 8. was ſuggeſted. 2 *Rol.* 319. *l.* 45. *Hob.* 286.

If the eccleſiaſtical court refuſe to grant a copy of the libel for which a prohibition is granted, and thereupon they grant the copy, and afterwards proceed in the cauſe, the matter not being *within* their juriſdiction, another prohibition lies. *Moor*, 917.

If the defendant in prohibition dies, his executors may proceed in the eccleſiaſtical court, and the judges of the court out of which the prohibition was granted will alſo in ſuch caſe make a rule to the ſpiritual court to proceed: But then the plaintiff may, if he pleaſes, have a new prohibition againſt the executors. *Lil. Rep.* 155.

The

Where a PROHIBITION may be granted after a CONSULTATION awarded, and where not, and of Diſobedience to the Writ of PROHIBITION.

The diſobeying a prohibition is a contempt to the ſuperior court that awards it, and puniſhable by *attachment*, which iſſues againſt the judge and party for proceeding after ſuch prohibition, and for which they are ſubject to fine and impriſonment, according to the direction of the ſuperior court. *F. N. B.* 40. *Bro. Att. Pro. pl.* 5. 9. 11. and 279. Though the writ was not directed to the party. 19 *Hen.* 6. 54. And ſuch attachment may be awarded againſt a peer of the realm. 21 *Edw.* 3. 3 *pl.* 7.

An *attachment* was granted upon an affidavit that the party proceeded after a prohibition delivered to him, in a ſuit for a ſeat in the church, which the plaintiff claimed by *preſcription*; and upon his appearance and examination upon interrogatories, he confeſſed the matter, and was fined five marks. Dr. *Wainwright's* caſe. 2 *Jon.* 47.

And not only an *attachment* lies for proceeding in the ſame cauſe pending a prohibition, but alſo for inſtituting a new ſuit for the ſame thing; as if a perſon libels for tythes, and a prohibition is brought, and he libels for tythes of another year, the firſt not being determined, an *attachment* ſhall be awarded. *Leon.* 111. *Moor*, 599.

And in an *attachment* upon a prohibition, the plaintiff ſhall recover damages and coſts againſt the party, for proceeding after the writ of prohibition awarded. *Cro. Car.* 559. 2 *Jon.* 128. *Vent.* 348. 3 *Lev.* 360.

Note, In the caſes of *prohibitions*, where they were granted on motion, the ancient courſe was, that the party prohibited ſued out a *ſcire facias quare conſultatio non debet concedi poſt prohibitionem*; in which writ the ſuggeſtion was recited, and alſo a prohibition granted thereon, *ad damnum* of the party—afterwards this practice was altered, and the courſe came to be thus: (*viz.*) Upon granting a prohibition to the plaintiff, the court bound him in a recognizance to proſecute *an attachment of contempt* againſt defendant, for ſuing in the ſpiritual court after a prohibition granted, and then to declare upon the prohibition, —So that he who was the defendant in that court, is now become actor or plaintiff in the court above.

Of the Writ of QUARE IMPEDIT, and Appearance thereto, &c.

A *Quare impedit* is a poſſeſſory action brought in the *Common Pleas* by all except the king, who may bring it in *B. R.* or *C. B. F. N. B.* 32. *E.* and is now the only action uſed in caſe of the diſturbance of patronage to a church or eccleſiaſtical benefice; the aſſize of *darrein preſentment*, which lies only for diſturbance where a man has an advowſon by deſcent from his anceſtors, having fallen into diſuſe, as the *writ of quare impedit* is equally remedial, whether a man claims title by *deſcent* or *purchaſe*. 3 *Blackſt. Com.* 246.

In order to bring a *quare impedit*, the party applies to the *curſitor* for an *original writ* out of *Chancery*, which is to this effect:

GEORGE the Third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, &c. To the ſheriff of ——— greeting. Command *Thomas*, *biſhop of* ——— *and* C. D. *Eſquire*, that juſtly and without delay they permit *A. B.* to preſent a fit perſon to the church of ——— in the ſaid county, which is void, and in the gift of the ſaid *A.* as he ſaith, and whereof he complaineth, that the ſaid biſhop and *C. D.* unjuſtly hinder him; and unleſs they ſhall ſo do, and the ſaid *A.* ſhall give you ſecurity that his ſuit ſhall be proſecuted, then ſummon by good ſummoners the ſaid biſhop and *C. D.* that they be before our juſtices at *Weſtminſter*, from ——— *, to ſhew wherefore they will not do it, and have you there the ſummoners and this writ.

Witneſs ourſelf at *Weſtminſter*, the ——— day of ——— in the twentieth year of our reign.

The ſheriff's warrant thereon.

——— to wit. *John Williams*, Eſquire, ſheriff of the county aforeſaid, to *O. P. Q. R. &c.* jointly and ſeverally, by virtue of his majeſty's writ to me directed, I command you, that you or ſome or one of you command *Thomas*, *biſhop of* ——— *and* C. D. *Eſquire*, that juſtly and without delay they permit *A. B.* to preſent a fit perſon to the church of ——— which is void, and in the gift of the ſaid *A.* as he ſaith, and whereof he complaineth that the ſaid biſhop and

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* Muſt have at leaſt *fifteen days* between the teſte and return.

Of the Writ of Quare Impedit, and Appearance thereto, &c.

C. D. unjuſtly hinder him; and unleſs they ſhall ſo do, and the ſaid *A.* ſhall give you ſecurity, that his ſuit ſhall be proſecuted, then ſummon by good ſummoners the ſaid biſhop, and *C. D.* that they be before his majeſty's juſtices at *Weſtminſter*, from ——— to ſhew wherefore they will not do it. And that you return the ſame to me, ſo that I may have there the ſummoners and this precept. Given, *&c.* at, *&c.* in, *&c.*

——— By the ſame ſheriff.

By the *ſtat. of Marlbridge*, 52 *Hen.* 3. the ſheriffs ought to make ſummons by good ſummoners, and return their names upon the original. 1 *Brownl.* 158.

And the ſummons ought to be ſerved on the defendant, or at the church door. *Ibid.* 2 *Mod.* 265.

The defendants may have the common *eſſoign*, or *de malo lecti*. 2 *Inſt.* 124. but no other *eſſoign*. 2 *Inſt.* 125. 1 *Brownl.* 160.

And if the defendants *eſſoign*, the plaintiff ought to adjourn it for 15 days, otherwiſe he ſhall be nonſuited. 1 *Brownl.* 159. *Dal.* 81.

Upon default of appearance, and no eſſoign, the plaintiff ſhall have an *attachment*, and afterwards a *diſtringas*. 2 *Inſt.* 124. 1 *Brownl.* 128.

And, by the *common law*, the proceſs to compel an appearance was by diſtreſs infinite. *Ibid.*

But now by the *ſtat. of Marlbridge*, if the defendant does not appear, nor caſt an *eſſoign* on the firſt diſtreſs, or before, there ſhall be judgment for the plaintiff, and a writ * to the biſhop. 2 *Hen.* 4. 1. *b.* 2 *Inſt.* 124. 1 *Brownl.* 158. *Dy.* 353. *b.*

But if the party be not actually ſummoned, there ſhall not be judgment upon default at the diſtreſs. 1 *Mod.* 248. 2 *Mod.* 264.

By the common law, and now by the *ſtat. art. ſup. chart.* 15. in ſummonſes and attachments, there ought to be 15 days excluſive between the *teſte* and return at leaſt. 2 *Inſt.* 567.

And by the *ſtat. of Marlbridge*, in *quare impedit*, or *darrein preſentment*, there ought to be only 15 or 21 days before the return.

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* *i. e.* A writ *ad admittendum clericum*; but then, before ſuch writ, there muſt be a *writ of inquiry* to inquire of *four points*, which *vide poſt*.

And

Of the Writ of QUARE IMPEDIT, and Appearance thereto, &c.

And the ſummons ought to be *teſted* the ſame day it iſſues, that there may be no prejudice in reſpect of *lapſe*. *Reg.* 30 *a. Bro. Qu. Imp.* 151.

If the injury done to the plaintiff, or the delay, ariſes from the *biſhop* alone, as upon pretence of incapacity, or the like, then he only is named in the writ.

But if there be another preſentation ſet up, then the pretended patron and his clerk are alſo joined in the action.

Or it may be brought againſt the pretended patron and his clerk, leaving out the biſhop.

Or againſt the patron only.

But it is generally brought againſt all three—for if the *biſhop* be left out, and the ſuit is not determined till *ſix months* are paſt, the *biſhop* is intitled to preſent by *lapſe*; but if he is named, and is made a party to the ſuit, no *lapſe* can poſſibly accrue till the right is determined; and therefore it is always moſt adviſeable to make him a party. *Cro. Jac.* 93.

If the *patron* is left out, and the writ is only brought againſt the *biſhop* and the *clerk*, the ſuit is of no effect, and the writ ſhall abate. *Heb.* 316. For the right of the *patron* is the principal queſtion in the cauſe. 7 *Rep.* 25.

And if the *clerk* is left out, and has received inſtitution before the action brought (as is ſometimes the caſe), the *patron* plaintiff, by his ſuit, may recover the right of patronage, but not the preſent turn; for he cannot have judgment to remove the *clerk*, unleſs he be made a defendant and party to the ſuit, to hear what he can alledge againſt it: for which reaſons, it is the ſafer way to inſert them all three in the writ.

If the clerk of the *pſeudo* patron has not been inſtituted, or if the plaintiff ſuſpects that the biſhop will admit the defendant's, or any other clerk, pending the ſuit, he may, immediately upon ſuing out the writ of *quare impedit*, ſue out alſo a prohibitory writ, called a *ne admittas*; which recites the contention begun in the king's courts, and forbids the biſhop to admit any clerk whatſoever, till ſuch contention be determined. The writ of *ne admittas* is to this effect:

GEORGE the Third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth: To the reverend father in God, *Thomas*, by divine providence, biſhop of ——— greeting. We prohibit you, that you admit a perſon to the church of ——— which is void, as it is ſaid, and concerning the advowſon whereof an action

is

Of the Writ of Quare Impedit, and Appearance thereto, &c.

is commenced in our court of the *Bench*, between *A. B.* Esq; and you and *C. D.* Esq; until it shall be discussed in the said court, *Whether* the said advowson belongeth to the said *A.* or to you and the said *C.* Witness ourself at *Westminster*, the day of in the twentieth year of our reign, *&c.*

If the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found in a *jure patronatus* *, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by *writ of scire facias*. 2 *Sid.* 94. and shall have a special action against the bishop, called a *quare incumbravit*, to recover the presentation, and also satisfaction in damages for the injury done him by incumbering the church by instituting the clerk, pending the suit, and after the *ne admittas* received †.

If one defendant should appear before the others, the plaintiff may declare against him *simul cum*, &c. 1 *Brownl.* 159.

Summons and severance lies if one plaintiff will not sue. 1 *Brownl.* 158.

And if the writ abates it may be brought by *journies accompts*. *Ibid.*

The writ may be general, and the count thereon *special*. *F. N. B.* 33. *a.* 5 *Co.* 102. *b.* 10 *Co.* 135.

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* A *jure patronatus* is a commission from the bishop, which he is bound to issue if requested by either of the contesting patrons, or their clerks, directed usually to his chancellor, and others of competent learning, who are to summon a jury of six clergymen, and six laymen, to inquire into and examine who is the rightful patron. 1 *Burn*, 16, 17.

† But if the bishop has incumbered the church by instituting a clerk before the *ne admittas* issued, no *quare incumbravit* lies: for the bishop hath no legal notice, till the writ of *ne admittas* is served upon him.

Of

Of Declaring in Quare Impedit.

Quare impedit being a poſſeſſory action, cannot be maintained without a poſſeſſion; for which reaſon the plaintiff muſt always declare upon a *preſentation* made by himſelf, or his anceſtor, as one whoſe eſtate he hath, or by the grantee of the next avoidance, or by his leſſee for life or years.

And the plaintiff in his declaration muſt ſhew a *title* to preſent.

And if he claims a right to preſent againſt common right, he muſt ſhew the commencement of it; as if he alledges preſentations by turns he muſt ſhew how this commenced, by preſcription, compoſition, or otherwiſe. *Dy.* 299. 3 *Leon.* 163.

And the plaintiff muſt ſhew a title in him before the avoidance. *Dyer*, 129. *b. Bend. pl.* 79.

And if there are ſeveral plaintiffs, and they vary in title, the writ abates. *R. Mod.* 184.

The plaintiff ought alſo to alledge a preſentment by himſelf or his anceſtor, or ſome other under whom he claims. *Vaug.* 7. 17. 57. But though it is generally neceſſary to alledge a preſentment, the want thereof will be cured by a verdict. *Stra.* 1006.

In a *quare impedit* for a united church, the patron ought to ſhew a preſentation either to the united church, or to one of the old churches. Vide *Ld. Raym.* 201, 202.

A purchaſer may alledge a preſentment by the vendor. 2 *Inſt.* 356.

And if the plaintiff alledges a preſentment without a precedent title, he muſt ſay it was *tempore pacis.* 1 *Mod.* 230.

But he need not, if a precedent title is alledged. *R.* 1 *Mod.* 230.

And if a preſentment be alledged by a common perſon, he muſt ſay, that the clerk was thereon inſtituted and inducted. *Bend. pl.* 297.

The laſt preſentment regularly ſhall be mentioned; and therefore if the biſhop preſents by *lapſe*, upon the next avoidance the patron in *quare impedit* ſhall make mention of that, 3 *Leon.* 18. *Dal.* 75.

And the plaintiff ought alſo to alledge a diſturbance.

And if the ſuit be by an executor or adminiſtrator, upon an avoidance in the life of the teſtator, an allegation of the diſturbance in the life of the teſtator is ſufficient. *R. Sav.* 95. *Lut.* 2.

Of amending the declaration in *quare impedit. Vide* 1 vol. title *Of the declaration, of amending the declaration*, &c.

Of

Of Pleading in Quare Impedit.

THE pleading in this action is very difficult, by reaſon of the variety and uncertainty of the rules concerning it. And therefore Lord *Hobart* adviſes plaintiffs in *quare impedit*, to name no more defendants than needs muſt be; and particularly the *biſhop* not to be named, if an incumbent be inſtituted before the *quare impedit* brought; for then the biſhop can do no more hurt to the plaintiff, for he can but inſtitute pending the *quare impedit*. 2*dly*, Not to name more diſturbers than ſuch as are like to have reaſonable titles; for every diſturber may make ſeveral titles, or confeſs and avoid the plaintiff's title, and if any paſs againſt him he is barred. *Hob.* 320.

To a declaration in *quare impedit* the defendants may imparl—and afterwards may either join or plead ſeverally. *Bro. Q. Imp.* 157. 165.

And they may plead in abatement, or to the action. But the ordinary cannot plead in *abatement*, or caſt an eſſoign, without making himſelf a diſturber. *Hob.* 200.

Every defendant may plead the *general iſſue*, which is *ne diſturba pas*; becauſe the plea doth not defend the wrong wherewith he ſtands charged, and leaves the plaintiff's title not only uncontroverted, but in effect confeſſed; and the plaintiff may upon that plea preſently pray a writ to the *biſhop*, or at his choice maintain the diſturbance for damages. *Hob.* 162. *Vaugh.* 58.

But the *biſhop* generally, when made a party to the ſuit, to ſhew that he is not a diſturber, pleads in bar of the action, that he claims nothing but as *ordinary*. *Hob.* 198. *Keil.* 43. *a. Co. Ent.* 498. *d.* 38 *Ed.* 3. 2.

He muſt diſclaim, or admit himſelf a diſturber. *Hob.* 320. And if he refuſes a clerk, without cauſe, he is a diſturber. 1 *Leon.* 230.

Upon ſuch plea by the *biſhop*, the plaintiff may have judgment againſt him with a *writ*, but a *ceſſat executio*, till the other pleas are determined. *Hob.* 320. *Vau* 6. *Keil.* 43. But if a *ceſſat executio* is not entered, it is only form. 1 *Rol.* 363. But if there be not a *ceſſat executio*, it is error, if execution be before the other pleas are determined. *Ibid.*

If the *clerk* of the *pſeudo patron* has been inſtituted, he generally pleads, that he claims nothing but as *perſona imperſonata ex preſentatione* of ſuch a one. Or he may plead *plenarty* of the plaintiff, or a ſtranger; and by the common law, *plenarty*, before the writ for any time, was a good plea. 2 *Inſt.* 360.

But now by the *ſtat. Weſt.* 2. *c.* 5. It muſt be *plenarty for ſix months* before the action brought to be a ſufficient bar of the plaintiff's action, to recover the preſentation, if the plaintiff prevails.

In

Of Pleading in QUARE IMPEDIT.

In pleading *plenarty* for *ſix months*, by the preſentment, either of the plaintiff himſelf, or by collation, or by lapſe by the ordinary, the incumbent need not make title. *Noy*, 30. But where he pleads the preſentment of a ſtranger, he ought to ſhew title. But *plenarty*, even for *ſix months*, is no plea againſt the king, according to the rule, *nullum tempus occurrit regi*. 2 *Inſt*. 361.

The *defendant patron*, if he does not rely on the *general iſſue*, or plead a releaſe, muſt ſet up a *title*, and traverſe the *plaintiff's*; but if he ſhews a title, ſubſequent to the plaintiff's, he need not traverſe the plaintiff's title, for then he confeſſes and avoids it.

In replying to the defendant's plea and title, it is not ſufficient for the plaintiff to deſtroy that title, without maintaining his own title. *Vaugh*. 60.

The conteſting parties go on to *iſſue* or *demurrer*, and the proceedings therein are the ſame as in other caſes; but in this action the plaintiff muſt recover upon the ſtrength of his own right, and not by the weakneſs of the defendant's. *Vaugh*. 7, 8.

Upon the trial the plaintiff is put to make out his own title; and upon failure thereof, the defendant is put upon the proof of his, in order to obtain judgment for himſelf, if needful.

If upon the trial the right be found for the plaintiff, the jury are to inquire of *four things*.—1. Whether the church is full. 2. Of whoſe preſentation; for if it be of the defendant's preſentation, his clerk is removable, if made a party to the ſuit, and the plaintiff commenced his action in due time, *i. e. infra tempus ſemeſtre*, by writ. 3. In caſe of plenarty upon an uſurpation, whether *ſix calendar months* have paſſed between the avoidance and the time of bringing the action; for if *ſix months* [*calendar* months, not lunar, as in temporal matters] have paſſed, it will not be within the ſtatute *Weſtm*. 2. which permits an uſurpation to be diveſted by a *quare impedit* brought *infra tempus ſemeſtre*. 2 *Inſt*. 361. 4. Of what value yearly the living is, and this in order to aſſeſs damages according to the ſtat. *Weſt*. 2. before which ſtatute no damages were allowed; but by that ſtatute, if *ſix months* paſs by the diſturbance of any, ſo that the biſhop do confer to the church, and the patron loſeth his turn, damages ſhall be awarded to two years value of the church; and if ſix months be not paſſed, but the preſentment be deraigned within the ſaid time, then damages ſhall be awarded to the *half year's* value of the church.

Of the Verdict, Enquiry, &c.

IF all the defendants make default upon the *diſtreſs*, the plaintiff has judgment againſt all, for all are ſuppoſed diſturbers. *R. Mod.* 81. and that without title made. *F. N. B.* 38. 11. *Semb. cont.* 1 *Brown.* 158.

But if the plaintiff recovers upon *demurrer*, there muſt be a *writ of inquiry* iſſued to inquire of the preceding *four points*, before the plaintiff has final judgment, and a writ to the biſhop. *R. Mod.* 81.

Or after a verdict for the plaintiff, if the jury have omitted to inquire of theſe points, there ſhall be a *writ of inquiry*; and till this is executed, the writ to the biſhop ſhall ſtay. 1 *Bro. Ent.* 327.

If the patron and incumbent confeſs the action, or *nil dicunt*, *&c.* there ſhall be judgment for the plaintiff, and a writ to the biſhop.

If the church remains void, the plaintiff ſhall recover no damages; and if the jury aſſeſs them, a *remittitur de damnis* muſt be entered. 3 *Lev.* 59. 2 *Inſt.* 362.

The damages are to be recovered againſt the diſturber; and therefore if the incumbent counterplead the title of the plaintiff as well as the patron, the plaintiff ſhall recover the value as well againſt him as againſt the patron. But no damages ſhall be recovered againſt the biſhop, where he claims only as ordinary— and *note*, The king is not within the ſtatute, becauſe by his prerogative, he cannot loſe his preſentation. 6 *Co.* 52.

Of the Judgment in QUARE IMPEDIT, &c.

IF it be found that the plaintiff hath the right, and hath commenced his action in due time, then he ſhall have judgment to recover his preſentation; and if the church be found to be full, by the inſtitution of any clerk, to remove him, unleſs it were filled *pendente lite*, by lapſe to the ordinary, he not being a party to the ſuit, in which caſe the plaintiff loſes his preſentation *pro hac vice*, but ſhall recover *two years* full value of the church from the defendant, the pretended patron, as a ſatisfaction for the turn loſt by his diſturbance; or in caſe of his inſolvency, he ſhall be impriſoned for two years. *Stat. Weſt.* 2. *ſ.* 5. *ſ.* 3.

If the action was commenced within ſix months, and the plaintiff have judgment to recover his preſentation, and the church be full, whereby the former preſentment will be deraigned, then damages ſhall be awarded to the plaintiff for half a year's value of the church.

Upon the plaintiff's recovering his preſentation, the writ iſſued in conſequence thereof is a writ directed to the biſhop, called a writ *ad admittendum clericum*; which recites the judgment of the court, and orders him to admit and inſtitute the clerk preſented; and if upon this order he does not admit him (the clerk being duly qualified), the patron may ſue the biſhop in a *quare non admiſit*, and recover ample ſatisfaction in damages.

The writ *ad admittendum clericum*, is to this effect:

"*GEORGE* the Third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth. To the reverend father in God, *Thomas*, by divine permiſſion, biſhop of ——— greeting: Whereas *A. B.* has lately in our court, before our juſtices of the *Bench*, at *Weſtminſter*, by the conſideration of the ſame court, recovered againſt *you and E. F. clerk*, and *C. D.* his preſentation to the *rectory* and pariſh church of ——— in our county of ——— and your dioceſe, which became vacant, and belongs to his preſentation: And whereupon it was conſidered by our ſaid court of the *Bench*, that the ſaid *A.* ſhould have our writ to you the ſaid biſhop, the ordinary of that place, to be directed; and notwithſtanding your diſclaimer, and the claims of the ſaid *E. F.* and *C. D.* or either of them, you ſhould admit a fit perſon to the rectory and pariſh aforeſaid, at the preſentation of the ſaid *A.* We therefore command you, that notwithſtanding your diſclaimer, or the claims of the ſaid *E. F.* and *C. D.* you admit a fit perſon to the rectory and pariſh church aforeſaid, at the preſentation

Of the Judgment in QUARE IMPEDIT, &c.

of the ſaid *A.* And how you ſhall have executed this our writ, certify to us on —— whereſoever we ſhall then be in *England.* Witneſs Sir *William de Grey*, knight, at *Weſtminſter*, the —— day of —— in the twentieth year of our reign, *&c.*

By the *ſtat. of Weſtm.* 2. *c.* 30. The judge of *niſi prius* has power to give judgment immediately; yet if he do not, upon return of the *poſtea*, judgment may be given by the court to which the return is made.

If the plaintiff is nonſuited, the judgment is peremptory, and the defendant ſhall have a writ *ad admittendum clericum* to the biſhop. 1 *Brownl.* 161. but not before *title* made. *F. N. B.* 38. *k.*

But if he has judgment upon *demurrer*, he ſhall have a writ to the biſhop preſently.

But the defendant cannot have a writ to the biſhop, if the *quare impedit* abates for form, miſnomer, or inſufficiency. *R.* 7 *Co.* 27. *b.* *F. N. B.* 38. *m.*

Note, If the ordinary does nothing upon the *writ ad admittendum clericum*, the party may have an *alias* and *pluries*, which may be returnable, and after that an attachment. *Reg.* 42. *a.* 80. *F. N. B.* 38. *c.* *Dy.* 254. *b.* 350. *a.*

There was a fine of 10*l.* for a bad return upon the firſt writ, and an *alias* under the penalty of 100*l.* 3 *Leon.* 139.

If the incumbent, of which the church is full, was not a party to the writ, he ſhall never be removed. *Co. Lit.* 344. *b.*

By the 3 *Hen.* 7. *c.* 10. [which gives *coſts* upon writs of error brought if judgment be affirmed], If the defendant bring a writ of error, and the judgment be affirmed, the plaintiff ſhall recover his coſts and damages for his wrongful delay.

By virtue of this ſtatute, the court of *King's Bench* have, upon a writ of error, awarded damages according to the value of the church found by the verdict. *Cro. Jac.* 145. 175.

But as the real damages which the plaintiff ſuſtains is only the being kept out of the half year's value, the legal interest on that ſeems to be all he is entitled to. *Stra.* 931.

In *quare impedit*, the biſhop pleaded no claim, but as ordinary, judgment paſſed againſt *C.* for non-appearance on *diſtringas.* And an iſſue between the plaintiff and incumbent on the right of preſentation was tried, and a verdict found for plaintiff. Afterwards a writ of enquiry was awarded to enquire of the *four uſual* matters. And by the inquiſition it was returned, that the vicarage was full of the defendant (incumbent

Of the Judgment in QUARE IMPEDIT, &c.

on the preſentation of the king—that it began to be vacant 26th *June* 1746, on the death of *J. R.* clerk, and that the value by the year was 120*l.* On which return, plaintiff moved for *coſts*, damages being given by the *ſtat. Weſtm.* 2. and by the *ſtatute of Glouceſter*, coſts are given in all caſes where damages, and cited 3 *Lev.* 35. *Skinn.* 25. On ſhewing cauſe, the rule was diſcharged. The ſtatute of *Glouceſter*, 6 *Edw.* 1. relates to caſes at common law, and ſtatutes antecedent. The ſubſequent ſtatute of *Weſtm.* 2. [13 *Edw.* 1.] created damages in *quare impedit*, where there were none before at common law, and gives *two years* value where the term is loſt by diſturbancy and lapſe *pendente lite*;—if not, and the living full, then half a year's value. *Vide Pinſola's caſe.* 10 *Co.* where the damages are created (none before), there no coſts; where the damages are additional, there coſts. *Sir T. Jones*, 234. *Keilway*, 26. In *quare impedit*, the king has no damages, becauſe he is not within the ſtat. of *Weſtm.* *Hob.* 23. If a writ of error is brought, and judgment affirmed, then coſts are given by *the ſtat. Hen.* 7. No coſts in any other inſtance. *Lemax* v. *Bp. of London. Creſpin Clerk, and Coke. Barnes*, 139.

Of Partition.

BY the *ſtatute* 8 & 9 *W.* 3. *c.* 31. An act for the eaſier obtaining partition of lands in coparcenary, joint-tenancy, and tenancy in common; after reciting, that "Whereas the "proceedings upon writs of partition between coparceners by "the common law or cuſtom, joint tenants, and tenants in "common, are found by experience to be tedious, chargeable, "and oftentimes ineffectual, by reaſon of the difficulty of diſ"covering the perſons and eſtates of the tenants of the manors, "meſſuages, lands, tenements, and hereditaments, to be di"vided, and the defective or dilatory executing and returning "of the proceſs of ſummons, attachment, and diſtreſs, and "other impediments in making and eſtabliſhing of partitions, "by reaſon of which divers perſons having undivided parts, or "purparts, are greatly oppreſſed and prejudiced, and the pre"miſſes are frequently waſted and deſtroyed, or lie uncultivated and unmanured, ſo that the profits of the ſame are "totally, or in a great meaſure loſt; for remedy whereof, *it is "enacted*, That after proceſs of *pone*, or attachment returned "upon a writ of partition, affidavit being made by any credible "perſon of due notice given of the ſaid writ of partition to the "tenant or tenants to the action, and a copy thereof left with "the occupier, or tenant or tenants; or, if they cannot be "found, to the wife, ſon or daughter (being of the age of "one and twenty years or upwards) of the tenant or tenants, "*or* to the tenant in actual poſſeſſion, by virtue of any eſtate "of freehold, or for term of years, or uncertain intereſt, or "at will, of the manors, lands, tenements or hereditaments, "whereof the partition is demanded (unleſs the ſaid tenant in "actual poſſeſſion be demanded in the action), at leaſt forty "days before the day of the return of the ſaid *pone* or attach"ment; if the tenant or tenants to ſuch writ, or any of them, "*or* the true tenant of the meſſuages, lands, tenements and "hereditaments as aforeſaid, ſhall not, in ſuch caſe, *within "fifteen days after return of ſuch writ of pone, or attachment*, "cauſe an appearance to be entered in ſuch court where ſuch "writ of *pone* or attachment ſhall be returnable; then, in "default of ſuch appearance, the demandant having entered "his declaration, the court may proceed to examine the de"mandant's title, and quantity of his part and purpart; and "accordingly as they ſhall find his right, part and purpart to "be, they ſhall for ſo much give judgment by default, and "award a writ to make partition, whereby ſuch proportion, "part and purpart, may be ſet out ſeverally: which writ being

"executed

" executed *after eight days notice to the occupier, or tenant or* " *tenants of the premiſſes*, and returned, and thereupon final " judgment entered, the ſame ſhall be good, and conclude all " perſons whatſoever after notice as aforeſaid, whatever right " or title they have, or may at any time claim to have, in " any of the manors, *&c.* mentioned in the ſaid judgment and " writ of partition, although all perſons concerned are not " named in any of the proceedings, nor the title of the tenants " truly ſet forth."

By *ſect.* 2. Provided, that if ſuch tenant or other ſhall in one year after judgment entered, or in caſe of infancy, coverture, non-ſanity, or abſence, within a year after ſuch inability determined, ſhew a good matter in bar of ſuch partition, *&c.* the court may ſet aſide ſuch judgment; but if the ſame is confirmed, the party appealing pays coſts.

By *ſect.* 3. No plea in *abatement* ſhall be admitted or received in any ſuit of partition, nor ſhall the ſame be abated by reaſon of the death of any tenant.

By *ſect.* 4. If the *high ſheriff* cannot be preſent at the execution of the judgment in partition, the under-ſheriff, in the preſence of two juſtices, may proceed therein—And in caſe ſuch partition be made, returned and filed, the tenants, before diviſion, are to remain tenants, under the ſame conditions, and the landlords, *&c.* are to make good to their tenants the ſaid parts as before partition made.

By *ſect.* 5. The ſheriffs, under-ſheriffs, *&c.* are to give due attendance to the execution of the writ of partition, and in caſe the demandant does not pay the fees to the ſheriff, *&c.* then the court ſhall award them, *&c.*

The above act was made perpetual by the 3 *&* 4 *Ann. c.* 18. *ſect.* 2.

Note, By the common law, *joint tenants* might agree to make partition of the lands, but one of them could not *compel* the others ſo to do; for as ſuch eſtate is originally created by the act and agreement of the parties, the law would not permit any one or more of them to deſtroy the united poſſeſſion without a ſimilar univerſal conſent. Whereas by the common law, *coparceners* were compellable to make partition, if any one of them choſe to ſue out *a writ of partition*. But now by the ſtatutes 31 *Hen.* 8. *c.* 1. and 32 *Hen.* 8. *c.* 32. *Joint tenants and tenants in common*, as well as *coparceners*, are compellable by *writ of partition* to divide their lands; and the above ſtatute of 8 *&* 9 *W.* 3. has only provided an eaſier method of carrying on the proceedings by the *writ of partition*, than was uſed at the *common law*.

Of the Writ of PARTITION, &c.

SINCE the above ſtatute, *partition* has been uſually made by *writ*; before which ſtatute it was done either by *writ, commiſſion, or conſent*, and was in many caſes liable to be defeated.

By the ſtatute 31 *Hen.* 8. *c.* 1. *joint tenants*, and *tenants in common*, or in right of their wives, are compellable *by writ* to make partition.

To proceed to make *partition*, according to this ſtatute, the demandant or demandants apply to the court of *Chancery*, and ſue out an *original writ*, which is to this effect:

GEORGE the Third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth. To the ſheriff of ——— greeting: If *A. B.* and *C. D* ſhall give you ſecurity, that their ſuit ſhall be proſecuted; then ſummon, by good ſummoners, *E. F.* that he be before our juſtices at *Weſtminſter*, on the morrow of *All Souls*, to ſhew wherefore, whereas the ſaid *A. B. C. D.* and *E. F.* hold together, and undivided, *the manor of* ——— *with the appurtenances, and fourteen meſſuages, twelve cottages, ſixteen barns, three dove-houſes, four ſtables, thirteen gardens, two hundred acres of land, two hundred acres of meadow, two hundred acres of paſture, two hundred acres of wood, one hundred acres of furze and heath, two hundred acres of moor, one hundred acres of buſhy ground, one hundred acres of marſh, one hundred acres of broom, twenty acres of land covered with water, twenty pounds rent; common of paſture for all manner of cattle, court-leet, courts baron, view of frank-pledge, profits and perquiſites of court, free warren, free chace, free fiſhery, goods and chattels of felons, fugitives, outlaws, and thoſe which are put in exigent, deodands, chattels waifed and eſtrayed, with the appurtenances,* in the pariſhes of ——— ——— and ——— of which the ſaid *E. F.* denieth partition to be made between them according to the *form of the ſtatute in ſuch caſe made and provided**, and unjuſtly permitteth not the ſame to be done, and contrary to the form of the ſaid ſtatute, as they ſay; and have you there the ſummoners, and this writ. Witneſs ourſelf at *Weſtminſter*, the ——— day of ——— in the nineteenth year of our reign.

* Or, "according to the cuſtom of *England*," if parceners by cuſtom.

Upon

Of the Writ of PARTITION, &c.

Upon this writ the ſheriff ſhould ſummon the tenants, and upon the return thereof, *affidavit* of the ſervice of ſuch writ ſhould be made according to the ſtatute, to this effect:

Between { *A. B.* and *C. D.* demandants, and *E. F.* tenant.

I. M. and *O. P.* of ——— officers to the ſheriff of ——— ſeverally make oath, and ſay, that they the ſaid deponents did, on the ——— day of ——— in the year of our Lord 1779, ſerve the above-named *E. F.* tenant, with the writ of partition in this cauſe, by delivering to and leaving with the ſaid *E. F.* a copy of the ſaid writ, and acquainting him with the contents thereof; and theſe deponents did, on the ſaid ——— day of ——— in the ſaid year of our Lord 17⁷9, deliver to and leave with *P. Q. R. S. T. V.* &c. the occupiers of the meſſuages, lands, and tenements, in the ſaid writ mentioned, a true copy of the ſame writ.

Sworn, *&c.*

Upon default of appearance in court, the *demandants* ſhould ſue out a *pone* or attachment, which is to this effect:

GEORGE the Third, *&c.* To the ſheriff of ——— greeting: Put by ſureties and ſafe pledges, *E. F.* of ——— that he be before our juſtices at *Weſtminſter* in eight days of *St. Hilary*, to anſwer *A. B.* and *C. D.* wherefore the ſaid *A. B. C. D.* and *E. F.* hold together and undivided *the manor of* ——— *with the appurtenances*, &c. [as in the writ], of which the ſaid *E. F.* denieth partition to be made between them, according *to the form of the ſtatute in ſuch caſe made and provided*, and unjuſtly permitteth not the ſame to be done; and to ſhew wherefore he was not in our court before our juſtices at *Weſtminſter*, on the *morrow of All Souls* laſt paſt, as he was ſummoned; and have there the names of the pledges and this writ.

Witneſs, *&c.*

This writ ſhould be ſerved in the ſame manner as the *writ of partition* was, and the parties ſhould be informed of the contents.

This *pone* ſhould bear teſte on the *quarto die poſt* of the return day of the *writ of partition*, and there muſt be fifteen days between the teſte and return of it at leaſt; and by the ſtatute of 8 & 9 *W.* 3. *ante*, there muſt be at leaſt *forty days* between the ſervice of the *writ of partition*, and the return of the *pone* or attachment.

Of

Of the Declaration in PARTITION.

IF the tenant does not within *fifteen days* after the return of the *pone* or attachment cauſe an appearance to be entered, the *demandant* may enter his declaration, and the court will proceed to examine his title; and if they find the right with the demandant, there ſhall be judgment by default for ſo much, and a *writ awarded to the ſheriff* to make *partition.*

Or if the defendant appears, the plaintiff muſt declare. The declaration is in the following form:

——— to wit, *E. F.* of ——— in the county aforeſaid, was ſummoned to anſwer *A. B.* and *C. D.* of a plea, wherefore, whereas the ſaid *A. B. C. D.* and the ſaid *E. F.* hold together and undivided, the manor of ——— with the appurtenances, *&c.* [ſpecify the premiſſes according to the writ], of which the ſaid *E. F.* denieth partition to be made between them according to the form of the ſtatute *in ſuch caſe made and provided*, and unjuſtly permitteth not the ſame to be done, and contrary to the form of the ſtatute: And whereupon the ſaid *A. B.* and *C. D.* by ——— their attorney, ſay, that whereas they and the ſaid *E. F.* hold together and undivided the tenements aforeſaid, with the appurtenances, whereof it belongs to the ſaid *A. B.* and *C. D* and their heirs, to have *one moiety* of the tenements aforeſaid, with the appurtenances, to hold them in ſeveralty, ſo that the ſaid *A. B.* and *C. D* of their *moiety* belonging to them of the tenements aforeſaid, with the appurtenances; and the ſaid *E. F.* of his *moiety* belonging to him of the tenements aforeſaid, with the appurtenances; may ſeverally apportion themſelves: He the ſaid *E. F.* denieth partition thereof to be made between them according to the form of the ſtatute in ſuch caſe made and provided, and unjuſtly permitteth not the ſame to be done, and contrary to the form of the ſaid ſtatute; whereupon they ſay, that they are injured, and have damage to the value of one hundred pounds. And therefore they bring ſuit, *&c.*

The declaration by one *parcener* or *joint tenant* againſt the others, muſt ſhew how they are joint tenants. *Cro. El.* 64.

But not where they are *tenants in common*, for they claim by ſeveral titles, and one is not conuſant of the others title. *R. Cro. El.* 64.

So,

Of the Declaration in PARTITION.

So, if they are parceners, *&c.* a declaration which ſhews that it was the inheritance of the common anceſtor in *tail*, is ſuffi ient, without ſhewing how the eſtate tail is commenced. *Dy.* 79. *b*

But if the declaration ſays that the plaintiff and defendant were ſeiſed in fee, where it is found that the defendant has only in tail, the writ abates. *R. Cro. El.* 760.

Of

Of Pleading in PARTITION.

TO the declaration there can be no plea in *abatement*, since the ſtat. 8 & 9 *W.* 3. *c.* 31. *ſ.* 3. Nor ſhall the writ abate by the death of defendant. *Ibid.*

And if he pleads in *bar*, he can plead no other plea than *non tenent inſimul*, for every other plea in bar is *tantamount* to *non tenent inſimul.*

Upon which plea iſſue may be taken, and the parties proceed to trial as in other caſes.

But the party may confeſs the action, and conſent that partition may be made.

In a writ of partition no *damages* ſhall be recovered, nor an enquiry of them. *Noy*, 68. 143. for it is a real action.

Proceſs having been duly returned, declaration entered, and no appearance entered by the tenant *within fifteen days*, purſuant to the ſtatute 8 & 9 *W.* 3. the court, on motion, granted a rule to ſhew cauſe, which was afterwards made abſolute, for the court to proceed to examine the title of the demandant, according to the ſtatute. On the morrow the title was examined, and no counſel appearing for the tenant, judgment on default was given for the demandant to hold in ſeveralty the premiſſes demanded in his count in ſome of which he was ſeiſed of two undivided third parts and in others of a moiety only with the *tenant*, the earl of *The net.* And a writ of partition was awarded accordingly. Upon the return of the writ, the ſheriff returned that he had executed the ſame in the preſence of perſons who attended for plaintiff and defendant reſpectively; and he ſpecified in his return the ſeveral parcels, with their metes and boundaries; and the plaintiff moved for final judgment, *quod partitio ſit ſtabilis.* And afterwards the writ was made abſolute, on affidavit of notice to the defendant and tenants in poſſeſſion. *Halton* v. *Earl of The net.* 2 *Blackſ. Rep.* 1134. 1159.

Of the Judgment in PARTITION.

IN *partition* there are two judgments, the firſt *quod partitio fiat*; the ſecond *quod partitio firma & ſtabilis in perpetuum teneatur*.

After confeſſion of the action or iſſue tried for the plaintiff, there ſhall be judgment *quod partitio fiat*. *Co. Lit.* 167. *b*.

And thereon a writ ſhall iſſue to the ſheriff to make *partition*.

The firſt judgment *quod partitio fiat* is in the following form:

Therefore it is conſidered, that partition be made thereof between them, *&c.* And it is commanded to the ſheriff, that in his proper perſon he go to the manor and tenements aforeſaid, and in the preſence of the parties aforeſaid, being forewarned, if they ſhall be willing, the manor and tenements aforeſaid, with the appurtenances, by the oath of good and lawful men of his county, reſpect being had to the true value of the manor and tenements aforeſaid, with the appurtenances, cauſe to be divided into *two equal parts* (or as the caſe is), and one part of thoſe parts he cauſe to be delivered and aſſigned to the ſaid *A. B.* and *C. D.* and the other part thereof to the ſaid *E. F.* to be holden to them and their heirs in ſeveralty, ſo that neither the ſaid *A. B.* and *C. D.* nor the ſaid *E. F.* may have more of the manor and tenements aforeſaid, with the appurtenances, than it belongeth to them to have; and that the ſaid *A. B.* and *C. D.* of their part to them thereof belonging, and the ſaid *E. F.* of his part to him thereof belonging, may ſeverally apportion themſelves; and that that portion, by the ſaid ſheriff ſo diſtinctly and openly made, he have here from the *day of Eaſter in fifteen days*, under his ſeal and the ſeals of thoſe, *&c.*

Error does not lie on the judgment *quod partitio fiat*, nor is the record removed by it, becauſe the writ of error comes too ſoon, and error does not lie till the final judgment *quod partitio firma & ſtabilis*, &c. 3 *Salk.* 145.

Of

Of the Writ DE PARTITIONE FACIENDA, &c.

UPON the foregoing judgment, the *demandant* ſhall have a *writ de partitione facienda*, which is to the following effect:

GEORGE the Third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth. To the ſheriff of ——— greeting. Whereas *E. F.* late of ——— in your county, Eſquire, was ſummoned to be in our court, before our juſtices at *Weſtminſter*, to anſwer *A. B.* and *C. D.* of a plea wherefore the ſaid *A. B.* and *C. D.* and the ſaid *E. F.* hold together and undivided the manor of ——— with the appurtenances [ſpecify the premiſſes according to the declaration], and the ſaid *E. F.* denied partition thereof to be made between them, according to *the form of the ſtatute in ſuch caſe made and provided*, and unjuſtly permitted not the ſame to be done, and contrary to the form of the ſtatute, as they ſaid; and the ſaid *E. F.* *appearing in our ſaid court, freely conſented that partition there might be made**: Whereupon it was conſidered in our ſame court, before our juſtices at *Weſtminſter*, that partition ſhould be made between them of the manor and tenements aforeſaid with the appurtenances. Therefore we command you, that taking with you twelve free and lawful men of the neighbourhood of ——— aforeſaid, by whom the truth of the matters may be better known, in your proper perſon you go to the manor and tenements aforeſaid, with the appurtenances; and there, in the preſence of the parties aforeſaid, by you to be forewarned, if they ſhall be willing to be preſent, the ſame manor and tenements, with the appurtenances, by the oath of the ſaid twelve free and lawful men, reſpect being had to the true value of the manor and tenements aforeſaid, with the appurtenances, you cauſe to be divided into *two equal parts*, and one part of thoſe parts to be delivered and aſſigned to the ſaid *A. B.* and *C. D.* and the other part thereof to the ſaid *E. F.* to be holden to them and their heirs in ſeveralty, ſo that neither the ſaid *A. B.* and *C. D.* and the ſaid *E. F.* may have more of the manor and tenements aforeſaid, with the appurtenances, than it belongs to them to have: And that the ſaid

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* If there was judgment by default, and the plaintiff declared and proceeded according to the ſtatute, it ſhould ſo be ſtated in this writ. ——So if defendant pleaded *non tenent inſimul*, and there was a verdict againſt him.

A. B.

Of the Writ DE PARTITIONE FACIENDA, &c.

A. B. and *C. D.* of their part to them thereof belonging, and the ſaid *E. F.* of his part thereof to him belonging, may ſeverally apportion themſelves. And that that partition by you ſo diſtinctly and openly made, you have here from the day of *Eaſter* in fifteen days, under your ſeal and the ſeals of thoſe by whoſe oath you ſhall have made that partition: And have you there the names of thoſe by whoſe oath you ſhall have made the ſame partition, and this writ. Witneſs Sir *William de Grey*, knight, at *Weſtminſter*, the —— day of —— in the twentieth year of our reign, *&c.*

Upon this writ, the ſheriff ought to give notice to the parties of executing the ſame——And he ought to attend in perſon. But by the *ſtat.* of *Will.* 3. *ante*, the under-ſheriff, or one who officiates as under-ſheriff, may execute the ſame in the preſence of two juſtices.

If the manor to be divided lies intermixed with other lands, ſo that the jury do not know the limits, quantity, *&c.* of the tenements to be divided, and the owner of the intermixt lands, *&c.* will not ſhew the certainty of his lands, yet the jury ought to make partition as well as they can. *Dy.* 266. *a.*

After the partition made, it muſt be returned to the court under the ſeals of the ſheriff and the twelve jurors. *Lit. ſect.* 249.

The return of the above writ.

AT which day here come as well the ſaid *A. B.* and *C. D.* as the ſaid *E. F.* by their attornies aforeſaid. And the ſheriff, namely, *John Thomas*, Eſquire, now here returns a certain partition between the parties aforeſaid, of the tenements aforeſaid, by the ſaid ſheriff, by virtue of the aforeſaid writ, and according to the form thereof, by the oath of twelve free and lawful men of the neighbourhood of —— aforeſaid made: Which follows in theſe words, to wit, —— to wit, I *John Thomas*, Eſq; ſheriff of the county aforeſaid, humbly certify and return to his majeſty's juſtices, at the day and place in the writ hereunto annexed mentioned, that by virtue of the ſaid writ to me directed, on the —— day of —— in the twentieth year of the reign of king *George* the Third, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth, and in the year of our Lord 1780, having taken with me *O. P. Q. R. S. T.* &c. twelve free and lawful men of my bailiwick, and of the neighbourhood in the ſaid writ mentioned, by whom

Of the Writ DE PARTITIONE FACIENDA, &c.

the truth of the matter may the better be known, in my proper perſon did go to the manor and tenements in the ſaid writ ſpecified; and there, by the oath of the ſaid jurors, in the preſence of the parties in the ſaid writ named, by me forewarned according to the command of the ſaid writ, and by their aſſent, the ſaid manor and tenements, with their appurtenances (reſpect being had to the true value of the ſame), I did cauſe to be divided into two equal parts, and one part thereof, that is to ſay, all thoſe *two meſſuages, two barns, and the land thereto belonging, called the* ——— *containing two hundred and twenty acres, two roods, and ſeven perches, more or leſs, late in the occupation of* William Jones, *and now of* Michael Dixon *and his aſſigns, and all that meſſuage, &c.* [ſpecifying in like manner the whole apportionment allotted to the demandants]; and all commons, common of paſture, woods, under-woods, and trees, ways, waters, eaſements, and appurtenances, to the ſaid ſeveral meſſuages, cottages, farms, lands, wood, ground, and premiſſes belonging or appertaining, or therewith uſed and enjoyed; all which ſaid premiſſes are ſituate, lying, and being in ——— in my ſaid county; and did cauſe to be delivered and aſſigned to the ſaid *A. B.* and *C. D.* in the ſaid writ named; and the other part thereof, that is to ſay, all the manor of ——— in the ſaid county of ——— with the court baron of the ſame; and all rights, royalties, members, and appurtenances thereof; and all that barn, farm, and lands, *&c. &c.* [ſpecifying the whole apportionment allotted to the defendant]. All which ſaid meſſuages, cottages, farms, barns, lands, woods, grounds, and premiſſes, are ſituate, lying, and being in the pariſh of ——— in my county, I did cauſe to be delivered and aſſigned to the ſaid *E. F.* Eſq; in the ſaid writ named, to be holden to them and their heirs in ſeveralty, as by the ſaid writ I am commanded; ſo that neither the ſaid *A. B.* and *C. D.* nor the ſaid *E. F.* might have more of the manor and tenements aforeſaid, with the appurtenances, than it belonged to them to have; and that the ſaid *A. B.* and *C. D.* of their part to them thereof belonging, and the ſaid *E. F.* of his part to him thereof belonging, may ſeverally apportion themſelves.

In witneſs whereof, as well I the ſaid ſheriff, as the jurors aforeſaid, to this indented partition, have ſet our ſeals the day and year and place above mentioned.

John Thomas, Eſq; Sheriff.

Of the final Judgment in PARTITION.

UPON the foregoing return to the writ *de partitione facienda*, the *final* judgment of the court is, "Therefore it is conſidered, that the aforeſaid partition be holden firm and effectual for ever, *&c.*" And therefore this judgment, when made by writ after the appearance of the party, ſhall not be defeated. *Co. Lit.* 168. *b.* 171. *a.* — even though made againſt a *feme* covert—*Ibid.*—or though not equal—*Ibid.*—or though not equal, and any one of the parties be an infant. *Ibid.*

And ſo by the *ſtat.* 8 & 9 *W.* 3 *c.* 31. If made without the appearance of the tenant, if he does not appear within fifteen days after the return of the attachment, where an affidavit was made of notice to the tenant *forty days* before the return of the writ, and a copy of it left with the occupier of the land.

But by the ſame ſtatute, if judgment be in a writ of partition, without the appearance of the defendant, upon motion ſhewing a probable bar, or that the demandant hath not title to ſo much, within a year after judgment, or (if the party was an infant, covert, nonſane, or out of the realm after the inability is removed) the court may order the defendant to plead, *&c.*

Or if the demandant's title be admitted, but the partition appears unequal, the court may award a new *partition*.

Of Waſte.

WASTE is the committing any ſpoil or deſtruction in houſes, lands, *&c.* by tenants, to the damage of the heir, or him in reverſion or remainder: whereupon the writ or action of *waſte* is brought for recovery of the thing waſted, and damages for the waſte done.

The *ſtat.* 52 *Hen.* 3. *c.* 22. *ſ.* 2. enacts, "That farmers "during their terms ſhall not make waſte, ſale, nor exile of "houſe, woods, and men, nor of any thing belonging to the "tenements that they have to farm; unleſs they have ſpecial "licence by writing or covenant, mentioning that they may "do it. Which thing if they do, and thereof be convicted, "they ſhall yield full damages, and ſhall be amerced grievouſly."

For an expoſition of this *ſtatute, vide Bac. Abr.* 5 *Vol.* 460.

Waſte may be committed, not only in houſes and lands, but in gardens, orchards, timber-trees, dove-houſes, warrens, parks, fiſh-ponds, and other ſubjects of property.

There are two kinds of *waſte*, viz. *voluntary or actual*, and *negligent or permiſſive*. *Voluntary* may be done by actual pulling down or proſtrating houſes, or cutting down timber trees; *negligent*, by ſuffering houſes to be uncovered, whereby the timber and ſpars are rotted.

The perſons who may be injured by *waſte*, are ſuch as have ſome intereſt in the eſtate waſted; as a *remainder man* or *reverſioner*. What ſhall be deemed waſte, and what not, *vide Bac. Abr.* 461. &c. *and Com. dig.* 5 *Vol.* 638. &c. and vide *ibidem*, by whom, and againſt whom, waſte lies.

Of

Of Remedy in Waste.

THE redreſs for the injury of waſte, is of two kinds, *preventive* and *corrective*: the former of which is by writ of *eſtrepement*, the latter by that of *Waſte*.

The writ of *eſtrepement* was a remedy at common law, after judgment obtained in any action real, and before poſſeſſion was delivered by the ſheriff, to ſtop any waſte which the vanquiſhed party might be tempted to commit in an eſtate, which was determined to be no longer his.

The *ſtat. of Glouceſter* gave the *writ of eſtrepement* alſo, *pendente placito*, to inhibit the tenant from doing waſte till the ſuit was determined.

Beſides this preventive writ at common law, the courts of equity, upon bill exhibited therein, complaining of waſte and deſtruction, will grant an *injunction*, in order to ſtay waſte until defendant ſhall have put in his anſwer, and the court ſhall make further *order*; which is now become the uſual way of preventing waſte.

Beſides the above methods to prevent waſte, there is an action of waſte, partly founded at common law, and partly upon the *ſtat. of Glouceſter*, 6 *Edw.* 1. *c.* 5. by which "a man may "have a *writ of waſte* in *Chancery* againſt a man who holds by "the law of *England*, or in other manner, for term of life, "or years, or in dower; and he who ſhall be attainted of "waſte, ſhall loſe the thing which he has waſted, and make a "ſatisfaction of *treble* of what the waſte ſhall be taxed at."

This ſtatute gave a *writ of waſte*, but before it, by the *ſtat. of Marl.* 52 *Hen.* 3. a writ of prohibition was given for waſte.

After which ſtatutes, the *ſtatute Weſtm.* 2. 13 *Edw.* 1. *c.* 14. enacted, "That of all manner of waſte done to the damage "of any perſon, there ſhall henceforth be no writ of *prohibition* "awarded, but a writ of *ſummons*; ſo that he, of whom com-"plaint is, ſhall anſwer for waſte done at any time. And if "he come not after the *ſummons*, he ſhall be attached; and "after the *attachment*, he ſhall be diſtrained. And if he come "not after the diſtreſs, the ſheriff ſhall be commanded, that "in proper perſon he ſhall take with him twelve, *&c.* and "ſhall go to the place waſted, and ſhall inquire of the waſte "done, and ſhall return an inqueſt; and after the inqueſt "returned, they ſhall paſs unto judgment, like as it is con-"tained in the ſtat. of *Glouceſter*."

And by *c.* 22. of ſame ſtatute, The action of waſte is maintainable by one *tenant in common* againſt another.—The

Of Remedy in Waſte.

equity of which, extends alſo to *joint tenants*, but not to *coparceners*; becauſe they might make *partition*, and ſo prevent waſte.

The action of Waſte, is a mixed action; partly real, ſo far as it recovers land, *&c.* and partly perſonal, ſo far as it recovers *damages*.

Of

Of Proceſs in WASTE.

THE proceſs incident to an action of waſte is a *ſummons* on the *original*, which the *curſitor* will make out from a *præcipe*.

If it is againſt tenant in *dower*, or guardian, it does not recite the ſtatute; but if it is againſt tenant for life, or years, or by the curteſy, it does.

The writ is to this effect, if againſt tenant in *dower*;

The king to the ſheriff of —— If *A.* ſhall make you ſecure, *&c.* then ſummon, by good ſummoners, *B.* who was the wife of *C.* that ſhe be before our juſtices at *Weſtminſter*, on, *&c.* to ſhew wherefore ſhe hath committed waſte, ſale, deſtruction, and baniſhment of lands, houſes, woods, gardens, *&c.* which ſhe holds in dower, of the inheritance of the aforeſaid *A.* in —— to the diſheriſon, *&c.*

If againſt tenant for life or years, it is to this effect:

The king to the ſheriff of —— If *A.* ſhall make you ſecure, *&c.* then ſummon, *&c. B. &c.* Wherefore ſeeing that it is provided by the common council of our realm of *England*, that it ſhall not be lawful for any perſon to commit waſte, ſale, or deſtruction of lands, houſes, woods, or gardens, the ſame *B.* hath committed waſte, *&c.* of the lands, houſes, woods, and gardens in *L.* which the aforeſaid *A.* demiſed to him, *&c.*

For other forms, vide *Fitzherbert's Natura Brevium*, &c.

If waſte is brought by the biſhop, or eccleſiaſtical perſon, the writ concludes *ad exhæredationem epiſcopi vel eccleſiæ.*

On the return of the *ſummons*, the defendant may *eſſoign* and the plaintiff adjourn, *&c.*

In waſte, *ſummons* and *ſeverance* lies, for the writ is *ad exhæredationem*, and it is a plea real. 2 *Inſtit.* 307.

If the tenant does not appear at the return of the *ſummons*, then plaintiff applies to the *filazer* of the county, for a *pone* or *attachment*, which is to the ſame effect; only "commanding the ſheriff if *A.* ſhall make him ſecure, *to put B. by ſafe gages and pledges, &c.*" On return of which, the plaintiff may apply for a *diſtringas, commanding the ſheriff to diſtrain, the tenant to appear, &c.*

If the tenant appears, the plaintiff declares againſt him, and the tenant pleads, or lets judgment paſs by default.—If the tenant does not appear, a writ of enquiry goes to the ſheriff;

Of Proceſs in Waste.

and on return thereof, plaintiff has judgment: of which, *vide poſt*, Title Judgment in Waſte.

In waſte againſt two by the biſhop *ad exhæredationem eccleſiæ*, and proceſs continued till the grand diſtreſs returned, one came and the other made default; and he who appeared, was compelled to anſwer alone, for the proceſs is determined againſt the other. *Br. Waſte*, pl. 99.

When the ſummons is ſerved upon the tenant, or upon the land, *fourteen days* before the return thereof, *proclamation* muſt be made of the ſummons on a *Sunday*, at or near the moſt uſual door of the church or chapel, of the town or pariſh where the lands lie; and that proclamation muſt be returned, together with the names of the ſummoners, purſuant to the 31 *of Eliz.* c. 4.

Of

Of the Count in Waste.

THE plaintiff muſt charge the defendant in the *tenet* or *tenuit*, for there is no other form. *Cro. El.* 356.

And muſt charge him as aſſignee, executor, *&c.* or according to defendant's tenure.

And the count muſt ſhew how plaintiff is entitled to the inheritance—as, if rector, he muſt ſhew that he is ſo. If he counts upon a leaſe by himſelf, he muſt ſhew his ſeiſin in fee and demiſe to defendant.—If upon a leaſe from his anceſtor, he muſt ſhew *ſeiſin*, a demiſe to defendant and deſcent to himſelf.—If he claims by fine, he muſt ſhew it, and the uſes of it. So if by common recovery—So if by grant of the reverſion—So if he and defendant are joint tenants, he muſt ſhew that they are ſo—So if he and the wife ſue in right of the wife—If he has the reverſion, he ſhall ſay the defendant holds of him—Otherwiſe, if he in remainder brings waſte—or if the lord by eſcheat does, for there is no tenure of him. *Hutt.* 110.

The declaration alſo muſt be conformable to the writ, for if the writ is for waſte in land, and it is aſſigned in cutting wood, it is bad.

So if the writ is for waſte in three *villes*, and the declaration is for waſte in one or in another *ville*.

The declaration muſt alſo particularize the quality and quantity of the waſte: as if it is in cutting trees, it muſt ſhew the number of the trees—If in houſes, he muſt ſhew the defects.

And muſt conclude if to his own diſheriſon, *ad exhæredationem* of the plaintiff.

If of lands whereof he is ſeiſed in right of his wife, *ad exhæredationem* of the wife.

And if by a biſhop, *&c.* it muſt conclude *ad exhæredationem eccleſiæ*. 2 *Roll.* 832. *l.* 30.

Of Pleading and View in Waste.

DEFENDANT in waſte may plead in abatement of plaintiff's title; as if he intitles himſelf to the reverſion *in fee*, defendant may ſhew a deviſe to him *in tail*. *Lutw.* 1557.

As to pleas in bar, defendant may plead *no waſte done*, which is the general iſſue, and this admits nothing, but puts the whole declaration in iſſue. *Lutw.* 1547.—Or he may plead a releaſe: or to waſte in the *tenuit, accord and ſatisfaction*. *Croll.* 357.

So defendant may juſtify, that he took for repairs;—ſo that he took for neceſſary *botes*—or that the trees were *aridæ mortuæ*, and neither bore fruit or foliage—or that the leaſe was without impeachment of waſte.—Or, he may plead no demiſe to him—or that a *meſne remainder man is alive*.

Or, he may plead in excuſe, *quod reparavit* before action brought, or that he rebuilt, and has ſince kept in repair.—Or, that the premiſes were ſo ruinous at the commencement of his leaſe, that he could not repair. *Mo.* 54.

After iſſues joined, the *venire facias* recites the iſſues, *and commands the ſheriff that he cauſe to come twelve*, &c. *to enquire if the defendant hath committed waſte* as plaintiff alledges. *Cro. Car.* 381.

In waſte, if iſſue is joined, the jury ought to have a view of the place or places waſted, otherwiſe trial ſhall be ſtayed: and ſix at leaſt muſt have a view. 2 *Saund.* 254. And the *venire facias* muſt be that the jury ſhall have view.

So, if there is judgment for want of appearance to the *diſtringas*, there muſt be a view and inquiſition taken, as well as upon iſſue joined. *R. Ow.* 12. For the law will not ſuffer ſo heavy a judgment as the forfeiture of the thing or place waſted, and *treble damages* to be paſſed upon a mere default, without full aſſurance that the fact is according as it is ſtated in the writ.

But upon default made after appearance and plea, there ſhall be no enquiry of *waſte*, for this caſe is not within the purview of the ſtatute *Weſtm.* 2. 2 *Inſtit.* 390, but enquiry of the damages only.

Nor ſhall there be enquiry of the *waſte*, upon a judgment by *confeſſion*, *nil dicit*, or *non ſum informatus*, but enquiry of the damages only: for the waſte is confeſſed. *Cro. El.* 18. *Hutt.* 44.

Of Judgment in Waste.

BY the *ſtatute of Glouceſter*, plaintiff, in an action of waſte is to recover the thing waſted, and *treble damages*.

If the judgment is againſt the defendant in the *tenet*, then it ſhall be for the place, and the *treble damages* found by the inqueſt.

But if it is againſt him in the *tenuit*, judgment ſhall be for the *damages only*.

If waſte be aſſigned in three houſes, two gardens, *&c.* the jury ought to find damages ſeverally for every of them; for if it be but of ſmall value for any of them, the court will not adjudge it waſte as to that part: but if the jury gives entire damages, it ſhall not be intended that there were *petit damages* in any, and therefore the verdict will be good. *Cro. Car.* 414. 452.

If verdict is for defendant, the judgment ſhall be *quod querens nil capiat*, &c. and defendant *eat inde ſine die*. 2 *Saund.* 247.

And if the defendant will not pray judgment to avoid a writ of error, it may be entered upon the prayer of the plaintiff againſt himſelf. 2 *Saund.* 253.

If plaintiff recovers upon the *tenet*, he has a writ of *ſeiſin* for the place waſted, provided the particular eſtate be ſtill ſubſiſting (for if it be expired, there can be no forfeiture of the land): and the damages are to be recovered in the ſame manner as all other damages, by *ca. ſa.*—*fi. fa.*—or *elegit*.

Of Dower.

DOWER, is that part of the husband's estate [that is, an estate of inheritance, *fee simple* or *fee tail*] which comes to the wife after the death of the husband—that is, the actual wife of the party at the time of his decease: so that, if she has been divorced *a vinculo matrimonii*, she is not entitled to dower.—But if she were divorced *a mensa et thoro* only, though it were for adultery, by the common law she should have her dower: yet now by *stat. Westm.* 2. if a woman elopes from her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled.

Widows of traitors are barred of dower, by *stat.* 5 & 6 *Edw.* 6. *c.* 11. (except in certain treasons relating to the coin), but not the widows of felons.

An alien widow of a subject cannot be endowed.

And to be entitled to dower, the wife must be above *nine years old* at the death of her husband.

The wife, by law, is entitled to be endowed of all lands and tenements, of which her husband was seised of in *fee simple* at any time, during coverture, or in *fee tail* general, or as heir in *special tail*, and of which any issue, which she might have had, might by possibility have been heir.

And she shall be endowed, as well of lands, *&c.* where the husband had a *seisin in law*, as an *actual seisin*. *Co. Lit.* 31. *a.*

And a widow shall be endowed of all her husband's lands, tenements and hereditaments, *corporeal* or *incorporeal*, unless there be a special reason to the contrary: for of a castle built for defence of the realm she shall not be endowed, nor of a common without stint—nor of a copyhold estate, unless by the custom of the manor: and then it is not called dower, but her *free bench*.

Where dower is allowable, it matters not, though he aliens the land during coverture; for he aliens it liable to dower.

Of

Of the Species of Dower.

THERE were five ſpecies of dower, four of which are now ſubſiſting.

1. *Dower de la pluis beale*, which was aboliſhed with the military tenures.

2. *Dower by the common law*, which is now the only uſual ſpecies ſubſiſting.

3. *Dower by particular cuſtom*, as that the wife ſhall have more than a third, or the whole, or only a quarter of her huſband's lands.

4. *Dower ad oſtium eccleſiæ.*

5. *Dower ex aſſenſu patris*, which is only a ſpecies of the laſt.

Dower ought to be aſſigned to the widow within *forty days* after her huſband's death; and by law ſhe has the privilege of ſtaying in the capital manſion, or ſome houſe whereof ſhe is dowable, for forty days after her huſband's death (the day of his death being accounted one), which is called the widow's *quarentine*; during which time ſhe is to be ſupplied with all neceſſaries at the expence of the heir; and before the end thereof, is to have her dower aſſigned her: and this privilege is confirmed by *Magna Charta*, *c.* 7.

Tenancy in dower, or an action for dower, ſeldom happens at this day, dower being generally barred by a *jointure* (as regulated by the ſtat. of uſes, 27 *Hen.* 8. *c.* 10.) made upon preconcerted marriages, or where the eſtate is conſiderable.

A widow may *prevent* her dower, or *forfeit* the ſame by her own act; the firſt caſe happens, when ſhe detains the charters or title-deeds and evidences of the eſtate from the heir; in which caſe ſhe is not entitled to dower till ſhe reſtores them.—And the latter happens, when after aſſignment, the dowager aliens the land aſſigned her for dower; in which caſe ſhe forfeits her dower *ipſo facto*, and the heir may recover it by action by the *ſtat. of Glouceſter.*

There are three things requiſite for the conſummation of dower; *viz.* marriage, ſeiſin, and the death of the huſband.

A woman entitled to dower cannot enter till it be aſſigned to her, and ſet out either by the *heir*, *terre-tenant*, or ſheriff (after recovery thereof by action) in certainty. *Roll. Abr.* 681. *Dy.* 346. *Plow.* 549. *Brook.* 18. *Co. Lit*, 34. *a.* 37. *a*, *b.*

Of the Proceſs in Dower.

IF the heir or his guardian do not aſſign the widow her dower within the term of *quarentine*, or do aſſign it unfairly, ſhe has her remedy at law, and the ſheriff is appointed to aſſign it. *Co. Lit.* 34. Or if the heir (being under age) or his guardian aſſign more than ſhe ought to have, it may be afterwards remedied by writ of *admeaſurement* of dower.

Dower may be recovered by *writ of dower unde nil habet*, or by writ of *right of Dower*.—The latter is proper when the wife has dower of part in the ſame ville: for then ſhe cannot have a dower *unde nil habet*, againſt the ſame tenant.—Vide *Com. dig. tit. Dower.*

The writ of dower *unde nil habet* may be ſued in the *Common Pleas*, or in the county by *juſticies*, or upon a *ſpecial cuſtom by plaint:* but it is uſually commenced in the *Common Pleas.*

A *præcipe* muſt be made out for the original writ, which is in the following form:

Berkſhire, to wit. Command *E. F.* that juſtly, *&c.* he render to *Ann B. widow, who was the wife of John B.* her reaſonable dower, which falleth to her out of the freehold which was of the ſaid *John B.* heretofore her huſband, in the pariſhes of *O. P. Q.* and *R.* whereof ſhe nothing hath, as ſhe ſays.

Returnable in eight days of the Purification of the Bleſſed Virgin *Mary.*

For forms of the *original writ*, *vide* the books of entries, *&c.*

The writ was, *command* B. *that he render* A. *her reaſonable dower of lands*, &c. *late of* C. *her huſband:* and becauſe the writ did not ſay, *Command* B. *that he render* A. *who was the wife of* C. *&c.* the writ was held ill. *Cro. Car.* 217.

When the *original writ* is obtained, the proceſs upon it is a *ſummons*, which is to be ſerved upon the tenant or upon the land: after which, fourteen days before the return thereof, *proclamation* muſt be made of that ſummons on a *Sunday*, at or near the moſt uſual door of the church or chapel of the town or pariſh where the lands lie; and that proclamation muſt be returned, together with the names of the ſummoners, purſuant to 31 *Eliz. c.* 4. for without it no *grand cape* can be awarded, but an *alias* and *pluries* ſummons.

The *proclamation*, by the ſtat. 31 *Eliz.* ought to be made at the pariſh church door, though it be in another county than where the land lies. *Cro. El.* 472.

Of the Proceſs in Dower.

At the return of the *ſummons*, defendant may caſt an *eſſoign*.

If the tenant caſts an *eſſoign*, at the return of the *ſummons*, it muſt be entered upon the *eſſoign day* of the ſame return.

And if no *eſſoign* be then entered upon the day of exceptions, the defendant may enter a *ne recipiatur*.

The return by the ſheriff is in this form:

Pledges of proſecuting, { *John Doe*, *Richard Roe*.

I have commanded the within-named ——— and at the great and common door of the pariſh church of ——— within written, upon the Lord's day (to wit), on the ——— day of ——— within written, immediately after divine ſervice and preaching ended, I have made publick proclamation according to the form of the ſtatute, and as this writ itſelf commands and requires.

Summoners of the within-named *E. F. R. S.* and *T. W.* } *W. W.* Eſq; ſheriff.

Upon the return of the ſummons, if the tenant does not appear, or caſt an *eſſoign*—or if an *eſſoign* is caſt, and at the day given by adjournment of the *eſſoign*, the tenant does not appear, the next proceſs is the writ of *grand cape*.—But then, before the *grand cape* iſſues, the demandant ſhall make her demand, for no certainty appears before the demand made. *Brook.* 96.

The writ of *grand cape* commands the ſheriff to ſeize the *third part* of the lands, *&c.* demanded; or, if the ſame are *gavel-kind*, to ſeize the *moiety*, *&c.* by the view of two honeſt and lawful men of the county, and to ſummon the *tenant*, &c.

For the form of the writ, *vide* the books.

If the ſheriff does not return the writ, an *alias grand cape* goes, at the return of the *grand cape:* and if the tenant alledges, that he was not able to come, it does not ſave his default. *R.* 3. *Lem.* 2.

So if *nulla tenementa*, &c. be returned, a *teſtatum grand cape* iſſues.

If the ſheriff executes the writ, the return is in this form:

By virtue of this writ to me directed, on the ——— day of *January*, in the year within written, I have taken into the hands of our lord the king, by the view of *A. B.* and *C. D.* honeſt and lawful men of my county, the *third part* of the lands

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lands and tenements within mentioned, with the appurts. as I am within commanded.

Summoners of the within-named *E. F. R. S.* and *T. W.* } *W. W.* Eſq; ſheriff.

If the tenant appears, he may wage his law of *non ſummons*, &c.—If he does not wage his law, there ſhall be final judgment againſt him.—Vide *Com. dig.* 5 *vol.* 240. and the Introduction to the firſt vol. of this work, for an explanation of this practice.

In dower of lands in *L. M.* and *N.* the ſheriff returns *pledges of proſecuting* A. B. C. D. *and the names of the ſummoners* E. F. G. H. *and that after the ſummons made, and fourteen days and more before the return of it, at the moſt uſual church door of* L. *where part of the lands lay, ſuch a* Sunday after ſermon ended, he publickly proclaimed, all and ſingular *the things contained in the writ, to be proclaimed according to the form of the ſtatute in that caſe made, and indorſed his name to the return.* To which an exception was taken, becauſe proclamation was not made at all the church doors; but *per Cur.* proclamation at any one of them is ſufficient—but the return was held ill; becauſe, he ſays, he had proclaimed all and ſingular the things in that writ contained, without ſaying what. *Hob.* 133.

Motion was made to ſet aſide the *grand cape*, proclamation not having been made *fourteen days* before the return of the *ſummons*, according to the 31 *of Eliz.* the ſummons was returnable *on the Morrow of All Souls*, and the proclamation was made the 27*th October*, which was but ſix days before the return. The court made a rule to ſhew cauſe, which was afterwards made abſolute, no cauſe being ſhewn. *Barnes*, 1.

Of Appearing, Counting, &c. in Dower.

IF the tenant appears upon the *ſummons, &c.* he may vouch the heir to warranty.

Or if the tenant appears upon the ſummons, or on the adjournment of the *eſſoign*, or if he appears at the return of the *grand cape*, and the defendant releaſes the default, the demandant ſhall count upon her writ. *Co. Ent.* 171. *a.*

The count ſhall be of a *third part* of ſuch a meſſuage, *&c.* for if it be of three meſſuages, *&c.* where there are ſeveral, and three is the third part of all, it is bad. 3 *Lev.* 169.—But *quære*, if it cannot be amended? Vide *ibidem.*

If dower is demanded of lands of the nature of *Gavelkind*, it muſt be of a moiety *dum ſola et caſta*; for if the plaintiff demands a third part, it is a good bar that the land is *gavelkind.* 1 *Leon.* 133.

The count muſt deſcribe the lands ſo certain, that ſeiſin may be given by the ſheriff, and therefore of a third part of three tenements is bad. 2 *Mod.* 355.

Dower does not lie *de tenemento*, being too indefinite. *Ld. Raym.* 1384.

If the demandant is not named, as *quæ fuit uxor B.* in the firſt part of the writ, it is bad; though afterwards, the lands demanded are called *terras B quondam viri ſui. Cro. Jac.* 217.

The tenant, after appearing to the *grand cape*, returnable the third return of term, obtained a rule, on motion, to ſhew cauſe why he ſhould not have an imparlance, which, at hearing, was diſcharged. *Et per Cur.* In dower *unde nil habet*, or any other real action, an imparlance is not to be given: *eſſoigns* are a ſufficient delay. Real actions are not within any of the rules of court concerning imparlances. *Barnes*, 2.

Of

Of demanding a View in Dower.

WHEN the demandant has counted, the tenant may demand a view of the lands demanded. *Co. Ent.* 177. *a.*

Or if dower is demanded of a rent, he may demand view of the land out of which it iſſues.

By *ſtat. Weſt.* 2. 13 *Edw.* 1. *c.* 48. The tenant ſhall not have a view, if the huſband of the demandant aliened to the tenant himſelf. 2 *Inſtit.* 481. 3 *Lev.* 169.—Or if the huſband died ſeiſed—Or if a prior writ of the demandant abated by a plea, which aroſe upon the view. And if the tenant demands a view when it is not allowable, the demandant may counterplead; as if the demandant's huſband died ſeiſed. *Cliſt.* 299. *Raſt.* 231. 3 *Lev.* 168.

The counter plea in ſuch caſe, prays, that the view may be excluded. Vide more of the view in *dower*, and what pleas may be had after. *Com. dig.* 5 *Vol.* 251. (and tit. abatement) (I. 25.)

Of Pleading in Dower.

THERE are ſome pleas which may be pleaded in abatement, as *ancient demeſne*.—That the demandant took huſband pending the writ—that her huſband was attaint—*non tenure*—*or nontenure* of part—that he holds jointly with *A.* not named.

As to pleas in bar, there are ſome which admit the demand; others which deny it.

Of the firſt ſort are the pleas of *tout temps priſt*, and if this is pleaded on the firſt day of the return of the ſummons, it will excuſe damages. *Co. Lit.* 32. *b.*

So the heir may plead detainment of *charters* and *tout temps priſt ſi, &c. Raſt.* 224. *b.* or detinue of *charters* as to parcel. *Sal.* 100.

Thoſe pleas which deny the right, are *ne unques ſeiſie que dower*—That demandant was under age dowable—that the huſband of demandant is alive—an elopement by demandant during coverture—or a divorce *a vinculo matrimonii*—or that demandant had a jointure—or that the huſband, or huſband and wife, levied a fine, and demandant made no claim within *five years*—or that the huſband ſuffered a recovery—or tenant may plead, that lands were aſſigned for dower by the heir, *&c.*—that there was a demiſe for years before coverture, rendering rent, and pray, that demandant may be endowed of the reverſion and rent—or that demandant has releaſed her dower to the tenant of the freehold—or *ne unques accouple* in lawful matrimony: upon which plea, a writ goes to the biſhop for his certificate of the marriage.

For pleas, and the replication to pleas, vide *Com. dig. Bac. Abr. &c.*

An iſſue was joined upon *ne unques accouple, &c.* and a writ awarded to the biſhop; he returned the evidence before him to prove the marriage, which appeared ſufficient, but did not poſitively return, that the parties were lawfully married. Plaintiff moved for judgment upon the return, but the court refuſed it, allowing plaintiff to move again; giving notice of the motion, that the other ſide might have an opportunity of diſputing the ſufficiency of the return.—The return was afterwards amended, and the fact certified inſtead of the evidence, and plaintiff had judgment. *Barnes*, 1.

On the plea of *ne unques accouple*, and iſſue thereupon, a writ was awarded to the biſhop; who certified that ſhe was accoupled *in vero matrimonio cum prædict. B. ſed clandeſtino et quod B. & E. (demandant) thori et menſæ participatione mutuo cohabitaverunt uſque ad mortem predict. B.* and judgment was there-

Of Pleading in Dower.

upon given for the demandant. On which, error was brought, and *inter alia* it was assigned, that there was neither day or place of the marriage mentioned in the certificate; but the court held it not material or issuable, because the certificate from the bishop is conclusive.—That the certificate is not good, because it did not answer to the words of the issue, "*Ne unques accouple in loyal matrimonie*;" for that it was a true matrimony, and that they lived together at bed and board, is but argumentative that they were *legitimo matrimonio copulati*; but the court disallowed this exception also: for *vero matrimonio*, though *clandestino copulati fuerunt*, is as good as *legitimo matrimonii*, and have all one intendment; and though it be *clandestino*, yet it doth not vitiate the marriage*: and when it is added, that *thori et mensæ participatione cohabitaverunt*, &c. this proves they continued as husband and wife during his life, and therefore it is not to be questioned now. Judgment affirmed. *Cro. Jac.* 351. *Brook*, 54. *Dyer*, 313. *Co. Lit.* 33. 9 *Co.* 19.

The plea of *ne unques accouple in loyal matrimonie*, which is the only plea whereby the lawfulness of a marriage can be put in issue, is only to be pleaded in a *real action*. Therefore the *certificate* of the ordinary is not at this day necessary in any personal or mixed action. *Salk.* 437. 1 *Lev.* 41.

* *Vide* the Marriage Act, 26 *Geo.* 2. *c.* 33. since this case.

Of Judgment in Dower.

1. *Of Judgment by Default.*

IF the tenant appears and makes default in the ſame term, there ſhall be final judgment againſt him. 2 *Saund.* 46.

Or if he confeſſes the action, or *nil dicit*, or *non ſum informatus*, there ſhall be judgment thereon.

But if the tenant makes *default* in another term, a *petit cape* ſhall iſſue. 2 *Saund.* 46.—And if he cannot ſave his default upon the *petit cape*, there ſhall be *final* judgment againſt him.

So if the tenant pleads that the huſband is alive, and the demandant, at the day for trial, is ready with her proofs, there ſhall be *final* judgment againſt the tenant if he makes default. 2 *Inſtit.* 80.

If the demandant is not preſent with her proofs, there ſhall be a *petit cape* awarded.

So if the tenant makes default at the trial by jury, there ſhall be a *petit cape* againſt him; and if he does not ſave his default, there ſhall be *final* judgment againſt him.

So there ſhall be judgment by default, though the tenant is an infant. *Cro. Jac.* 111.

In dower againſt an infant, he made default upon the *grand cape* returned: and it was held *per tot. Cur.* that judgment ſhall be given upon the default; for the infant ſhall not have his age in *dower*, which being but for life, demandant may be totally defeated by his frequent defaults—though ſome of the books ſay, that if judgment be given upon the *grand cape* before appearance, this is error: *ſecus*, if he appears by guardian, and after loſeth by default; for then, if any default be in the guardian, he ſhall recover againſt him in a writ of *diſceit*; but other books doubt if the infant ſhall not have his age in dower: however, the other ſeems the more reaſonable opinion. *Cro. Jac.* 111. 392. *&c. vide Moor*, 1148, *&c.*

On error to reverſe a judgment in dower, at the grand ſeſſions in Wales, it appeared by the record, that the tenant appeared at the return of the *ſummons*, and day was given over; *and then came by attorney, and ſaid nothing in bar. Whereupon it was conſidered, that the third part of the lands aforeſaid, ſhould be taken into the hands of our lord the king*; and upon day given *ad aud. judicium*, judgment was given, that the demandant do recover. The error aſſigned was, that they ought not to have awarded a *petit cape*, becauſe, as defendant appeared, they ought to have given judgment on the *nil dicit*; for the *petit cape* is always *upon default after appearance*, and is only to anſwer the default, as the *grand cape* is before appearance, to

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1. *Of Judgment by Default.*

anſwer the default and demand. But this was held to be no error, being only an awarding of more proceſs than was neceſſary, and it was of advantage to the tenant by delaying the *demandant*. And, *per Twyſden*, if erroneous, they might now give judgment upon the *nil dicit* in this court. *Vent.* 60. 2 *Saund.* 46. 50. 2 *Keeb.* 450, &c.

In dower, the tenant at the day of taking the inqueſt, after the jury had appeared, and before they were ſworn, made default, and a *petit cape* was awarded; and the tenant at the day in *banco* informed the court, that he was but tenant for life, and the reverſion in one *A.* who at the day in *banco* ought to be received; and the court appointed him to plead his plea at the return of the *petit cape*, before which time his appearance ſeems idle. *Brownl.* 126.

The demandant upon judgment by default, after a *grand cape*, ſhall have no damages upon the inquiſition found, if there was no notice of executing the *writ of enquiry*. 3 *Lev.* 409.

Of Judgment in Dower.

2. *Of final Judgment, Writ of Enquiry, Seiſin, &c.*

THE final judgment in dower is, *quod quærens recuperet ſeiſinam de tertia parte tenementor': petit*; or if it be of *gavel kind lands, quod recuperet ſeiſinam de dimidio, &c.*

And by the *ſtat of Merton*, 20 *Hen.* 3. *c.* 1. *Si recuperaverit tenementa de quibus vir obiit ſeiſitus, tenens reddat damna, viz. valorem dotis à tempore mortis viri uſque ad diem, quo per judicium curiæ, ſeiſinam ſuam recuperaverit.*

And therefore after judgment for ſeiſin, and *habere facias ſeiſinam* awarded, if the demandant makes a ſuggeſtion upon the roll, that her huſband died ſeiſed, there ſhall be a writ to enquire what damages. 1 *Lev.* 38. *Cl. ſt.* 302.

And upon return of the inquiſition, there ſhall be judgment *quod recuperet valorem*, and her damages. Or the jury who try the iſſue may alſo enquire of the *value and damages*. Or the demandant may remit the *value and damages*, and have an *habere ſeiſinam* immediately. *Town, Jud.* 100.

Though the ſtat. ſays only, that ſhe ſhall recover damages to the time of the judgment; yet if ſhe obtain judgment by *default*, upon a writ of enquiry, the jury may give her damages to the time of the inquiſition, unleſs ſhe were in poſſeſſion before by virtue of an execution awarded upon the judgment by default. The jury may aſſeſs damages beyond the revenue, for ſhe may have ſuſtained more. 1 *Leon.* 56.

Damages in dower, by the *ſtat. of Merton*, extends only to lands, whereof the huſband died ſeiſed; and therefore, if the jury do not find that he died ſeiſed, judgment for damages will be reverſed. They muſt find too, of what eſtate he died ſeiſed, viz. an eſtate *in fee*, or *in tail*; for if the huſband alien, and take back an eſtate for life, the wife ſhall recover *dower*, but no damages.

If the jury find the huſband died ſeiſed, they muſt find the time when, the annual value of the land, damages on account of the detention and coſts; but if they find the huſband was ſeiſed, but did not die ſo, then no coſts or damages, but only the value of the land: for damages are only given by *ſtat. of Merton*, where he died ſeiſed; and the *ſtat. of Glouceſter* gives coſts only where plaintiff recovers damages. 2 *Saund* 33.

The reaſon why the jury are to find the value of the land in caſe the huſband died ſeiſed, is, that the court may give *damages* purſuant to the *ſtatute of Merton*, from the death of the huſband, to the time of the judgment. And if the heir ſell to *J. S.* and the widow recovers her dower againſt him, he muſt pay the

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2. *Of final Judgment, Writ of Enquiry, Seiſin, &c.*

whole *meſne p ofits*, from the death of the huſband, though he have not himſelf been half the time in poſſeſſion. She is entitled by the ſtatute, and can recover only againſt the tenant. *Brown and Ux.* v. *Smith. Hil.* 25, 26 *Car.* 2. *C. B.*

Damages muſt be after demand of dower; for the heir is not bound to aſſign till demanded. But unleſs the heir plead *tout temps priſt*, he ſhall not take advantage of the widow's *laches* in not demanding; and though he pleads *tout temps priſt*, yet ſhe ſhall recover damages from the teſte of the original, to the execution of the writ of enquiry; but if the heir aſſign dower, and widow accepts thereof, ſhe loſes her damages. *Co. Lit.* 32. *Kent and Kent, Mich.* 1733. *B. R. Yeo and Ye.* 14 *Geo.* 2. *B. R.*

Upon a trial at bar, the iſſue was, if there was a demand of dower to entitle plaintiff to damages; ſhe proved an actual demand of the heir, who was an infant; and the court held that dower was demandable of the heir, though under 14; and that the not aſſigning of dower, though the infant did not refuſe to do it, but was prevented by his guardian, was a refuſal in law ſufficient to entitle plaintiff to damages. *Corſellis* v. *Corſellis. Hil.* 29, 30 *Car.* 2. *C. B.*

On execution of a writ of enquiry of damages, the jury found for damages the value of a *third* of the land, from the time of the huſband's death, till the day of the inquiſition, without any deduction for *reprizes* (viz. land tax, repairs, and chief rent), and for coſts, the ju.y gave the amount of the attorney's bill for demandant, upon his evidence that it was a reaſonable bill, and that he expected it from his client. The court thought that the value of the *third* of the profits run ſince the death of the huſband, ſhould have been computed only to the time of awarding the writ of enquiry, and not to the day of the inquiſition; that an allowance ought to have been made for *reprizes*; the words of the writ are *(ultra repriſas)*; and that the attorney's bill to his client was the meaſure of coſts. The inquiſition was ſet aſide, and a new writ ordered to be executed before a judge at the next aſſizes, on payment of coſts. *Barnes*, 234. Q. If the jury ought not to have given common coſts as *one ſhilling*, and the reſt allowed as coſts *de incremento* by the prothonotary. But it has been ſaid, that if the jury give damages a *morte viri*, to the time of the inquiſition, though it is after the judgment, it will be good. *R. Leon.* 56.

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So though they give damages beyond the value of the land. Value or damages are only recoverable in dower *unde nil habet*. *Co. Lit.* 32. *b.*

The writ of *ſeiſin*, and *enquiry of damages*, are blended in one writ.

If dower is demanded of *lands*, or of things that may be ſevered, the ſheriff ought to aſſign her *third part* by metes and bounds; and if the ſheriff does not return ſeiſin by *metes and bounds*, it is ill, unleſs cloſes certain are aſſigned by name, or ſuch a manor which is known and certain, in lieu of dower of other manors. *Perk.* 414. *Rol. Abr.* 682. *Co. Lit.* 34. *Bendl.* 87. But an aſſignment, though in a different manner by conſent of the parties, may be good. *Cro. El.* 310. *Rol. Abr.* 683.

If a woman be dowable in three manors, and accepts of the heir one of thoſe manors, in lieu of dower in all the reſt, this is good, though againſt common right, which gives her but the third part of each manor. *Roll. Abr.* 683.

But to a writ of *habere facias ſeiſinam*, the ſheriff cannot return that he delivered the demandant one, inſtead of a *third part* of the three, in recompence of her dower.

Upon recovery of dower, and ſeiſin awarded, the ſheriff returned that he had aſſigned to the demandant her dower of a houſe, the *third part* of each chamber, and had chalked it out to her. And this return was held an idle and malicious return, and he was committed for it, as in ſuch caſe, he ought to have aſſigned her certain chambers, or rooms thereout. *Palm.* 265.

The ſheriff was committed, for refuſing to make an equal allotment of dower, and taking 60*l.* of demandant to execute the writ, and the court ordered an information againſt him for it. 1 *Keeb.* 743.

If dower is demanded of meadow, paſture, *&c.* the ſheriff may aſſign all meadow, *&c.* for dower. *R. Mod.* 12. 19.

A woman recovered dower, had a writ to the ſheriff, who returned that he had delivered 84 acres to the demandant of the land mentioned in the writ. After a *ſcire facias* was brought, ſuggeſting that 60 acres of the 84 aſſigned to her by the ſheriff were a ſtranger's, not mentioned in the record, and therefore ſhe ought to have a new diviſion. The tenant ſaid, that the other 24 acres were parcel of the land recovered, and that ſhe had entered and accepted the 24 acres; and upon de-

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murrer it was adjudged, that ſhe was barred by the acceptance and entry into the 24 acres. *Moor, pl.* 167. 928. *Dy.* 91. *in margine.*

Dower was brought *de tertia parte* of a mill, kiln-houſe, *&c.* and judgment was to recover the *third part in ſeparalitate per metas & bundas.* And this judgment was reverſed upon error, for it ought to have been of the third part generally; for if *per metas & bundas*, none can make uſe of it. *Lev.* 181. 2. *Keeb.* 8.

If demandant dies before writ of enquiry executed, her adminiſtrator cannot bring a *ſcire facias* for the damages and *meſne profits. Salk.* 252.

So if tenant dies after judgment and writ of *ſeiſin* executed, the demandant cannot have a *ſcire facias* for enquiry of damages, after the death of the tenant, againſt his heir or tertenants. 3 *Lev.* 275. 1 *Sid.* 188.

By 16, 17 *Car.* 2. *c.* 8. execution ſhall not be ſtayed by writ of error, upon any judgment after *verdict*, unleſs plaintiff become bound to pay damages and coſts in caſe of affirmance, or plaintiff diſcontinue or be nonſuit; and a writ ſhall iſſue to enquire of meſne profits, and damages by waſte done after the firſt judgment. *Stra.* 971.

Judgment in dower ſhall not be ſtayed by error, if plaintiff in error doth not enter into recognizances to pay damages and coſts. *Carth.* 134.

If judgment be affirmed in *dom. proc.* and coſts given, the demandant may bring an action on the recognizance for ſuch coſts, without ſuing out a writ of enquiry. *And.* 153.

Of Error.

A *Writ of error* lies for ſome miſtake, or ſuppoſed miſtakes, in the proceedings of a *court of record*; for to amend errors or miſtakes in a baſe court, not of record, a *writ of falſe judgment* lies; of which hereafter.

A writ of error is a writ of right in all caſes but *felony and treaſon*. *Salk.* 504. and may be had againſt the king.

Error lies either in the ſame court where the judgment was, or in a ſuperior court.—It lies in the ſame court where the judgment was given, when the *error* was not for any fault in the court, but for ſome defect in the proceſs of the cauſe, other than in the judgment, or for default of a continuance. *Dy.* 196. *a.* or for default in *adjudging execution*. 1 *Rol.* 176. 7 *Hen.* 6. 30 *Yelv.* 157. *F. N. B.* 21. *i.* as for miſpriſion of the clerk, or for error in *fact*; and there the writ may be in the ſame court.—1 *Sid.* 208. except where ſuch error is in the *Exchequer*. 3 *Lev.* 38.—But if there is error in *law*, or in the judgment of the court, then the writ lies to a ſuperior court; and ſuch writ of error only lies upon matter of *law* ariſing upon the face of the proceedings, ſo that no evidence is required to ſubſtantiate or ſupport it; for if there has been an error in the determination of the *facts* in the cauſe, which it was the province of the jury to determine, the method of obtaining redreſs, in ſuch caſe, is not by *writ of error*, but by an attaint of the jury, or appealing to the juſtice of the court to grant a *new trial*, in order to correct the miſtakes of the former verdict.

A *writ of error* lies from almoſt all inferior courts of record in *England* into the *King's Bench*. But *error* does not lie from any inferior court of record in *England* into the *Common Pleas*, except in two or three caſes; for which vide *Com. Dig. Bac. Abr. &c.* But the better opinion ſeems to be, that error lies not into *C. B.* in any caſe. In courts newly conſtituted, and which are impowered to proceed in a method different from the courts of *common law*, their judgment is not ſubject to a writ of error; but yet the *King's Bench* may examine them by *certiorari*, or *mandamus*.

Till the late repeal of the *declaratory act* 6 *Geo.* 1. *c.* 5. the Houſe of Lords in *Ireland* had no juriſdiction of error from any court there; and error in a judgment in the *King's Bench* in *Ireland* lay immediately in the *King's Bench* here. But now the Houſe of Lords in *Ireland* will be the *dernier reſort* there, as it is in *England*.

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IF there is *error* in the proceedings of an *inferior court of record*, application muſt be made by the *plaintiff in error* * to the curſitor for a *writ of error*, which writ may bear *teſte* before the judgment given; and this is the uſual courſe for preventing and ſuperſeding the execution; but then judgment below muſt be given before the return of it. 3 *Keeb.* 308. *Vent.* 96. *Latch.* 133. For if it ſhould be made returnable before judgment given, it is ſuch a fault as is not amendable. *Stra.* 807.

Upon a ſhort abſtract or *præcipe* delivered, the curſitor will make out the *writ of error* returnable in *B. R.* as that court has, by its conſtitution, a ſuperintendency over all inferior juriſdictions.

If error is in the county palatine of *Lancaſter*, the writ is directed to the chancellor or his deputy, commanding, that he give it in charge to the juſtices at *Lancaſter*, that they ſend to him in his chancery the record, *&c.* and the writ which came to him thereupon, and that he tranſmit the record.

But if an erroneous judgment be given in *Durham*, in the chancery, upon proceedings according to the common law, or before the juſtices of the biſhop, a writ of error lies before the biſhop himſelf; and if he gives an erroneous judgment, error lies in the *King's Bench*.

Errors in judgments, *real and mixt*, before the juſtices in their great ſeſſions in *Wales*, lie in the *King's Bench*, by the 34 & 35 of *Hen.* 8. *c.* 26.

And errors in judgments, in pleas *perſonal* there, lie alſo in the *King's Bench*, ſince the *ſtat.* 1 *W.* & *M. c.* 27.

But error on a judgment in the *Cinque Ports*, lies neither in the *King's Bench* nor *Common Pleas*; but by cuſtom, ſuch judgment is examinable by *bill*, in nature of a writ of error, *coram domino cuſtode, ſeu guardiano quinque portium apud curiam ſuam de Shepway.*

Nor does *error* lie in the *King's Bench* or *Common Pleas*, on a judgment in the *ſtannaries*, but an appeal to the guardian, and from him to the prince; and if no prince, to the king's council.

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* ☞ It is a certain rule, that all the parties to the ſuit below, muſt, in all caſes of *error*, be made parties alſo in the writ of error; and in caſe of the death of a party, he muſt be named, and his death alledged in the *writ*. And if one refuſes, he ſhould be ſummoned and ſevered. *Carth.* 7. *Stra.* 606.

As

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As ſoon as the writ is made out, the party who ſued it muſt carry it to the *prothonotary* of the inferior court, and get it allowed; and if execution ſhould have been ſued out, that officer will alſo grant a *ſuperſedeas* to the ſame; but if no execution ſhould have iſſued, the allowance of the writ of error is of itſelf a ſufficient *ſuperſedeas*, and no execution can then be taken out.

Upon a *writ of error* to remove the record from an *inferior court*, the party removing it need not formerly put in *bail* below; for the ſtatutes requiring *bail* upon proſecuting *error*, did not extend to the inferior courts of record. But, now, by the ſtat. 19 *Geo.* 3. *c.* 70. *ſ.* 5. "No execution ſhall be ſtayed "or delayed, upon or by any *writ of error* or *ſuperſedeas* thereon "to be ſued, for the reverſing of any judgment in any inferior "court of record where the damages are under 10*l.* unleſs "ſuch perſon or perſons, in whoſe names ſuch writ of error is "brought, with two ſureties, ſuch as the inferior court ſhall "approve, before ſuch ſtay made, or *ſuperſedeas* awarded, be "bound unto the party for whom ſuch judgment was given in "a recognizance to be acknowledged in the ſame court, in "double the ſum adjudged to proſecute ſuch writ of error with "effect; and pay (if the judgment is affirmed, or writ of "error nonproſſed) all the debt, damages, and coſts adjudged; "and all coſts and damages awarded for the delaying of exe-"cution."

On the return of the *writ of error*, the *defendant* in error ſhould ſerve the *plaintiff* in error with a rule out of the inferior court to tranſcribe the record, who, upon ſervice thereof, ſhould beſpeak the tranſcript of the record of the proper officer below, and carry the ſame into the office, and file the ſame, if in *B. R.* with the *ſigner of the writs*. The officer who is to receive and deliver out *writs of error*, and *certiorari*, &c. now Mr. *Heberden*.

The tranſcript ſhould be filed before the ſecond ſeal, or the *defendant in error* may apply and get a *certificate* from the office, that the *writ of error* is not returned, and the tranſcript brought in; and may thereupon apply to the *curſitor* for a writ of *executio judicii* directed to the court below, and commanding them, that, notwithſtanding the *writ of error*, they proceed to execution on the ſaid judgment.

If the tranſcript is brought in by the *eſſoign day* of the term, the defendant in error may ſue out a *ſci. fa. quare ex. non*; and this writ may bear *teſte* the laſt day of the preceding term. And

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if the tranſcript is brought in within term, ſuch *ſci. fa.* may bear *teſte* the firſt day of that term.

The defendant in error cannot tranſcribe the record. 1 *Wilſ.* 35. but if the plaintiff does not tranſcribe it, he muſt be ſerved with a rule to tranſcribe. But if the tranſcript of the record is carried in and filed in due time, each party ought to beſpeak a copy thereof, which is made out at the rate of 4 *d. per* ſheet; and the *defendant* in error ſhould then, in order to accelerate the *plaintiff* in error, ſue out a *ſcire facias quare executionem non*, directed to the ſheriff of the county where the original action was brought, and which is to this effect:

GEORGE the Third, by the grace of God, *&c.* To the ſheriff of ——— greeting. Whereas *A. B.* lately in our court of ——— [*the inferior court*] before the judges of the ſame court *without our writ*, and by the judgment of the ſame court, recovered againſt *C. D.* 10 *l.* for his damages which he ſuſtained, as well by occaſion *of the not performing certain promiſes and undertakings made by the ſaid* C. to the ſaid *A.* at ——— in your county, and within the juriſdiction of the ſame court, as for his coſts and charges expended by him about his ſuit in that behalf, whereof the ſaid *C.* is convicted, as by inſpecting the record and proceſs thereof in our court, before us at *Weſtminſter*, now remaining, and which, for certain cauſes, we lately cauſed to be brought in our ſame court before us, appears to us. And now, on behalf of the ſaid *A.* in our court before us, we have been informed, that although judgment be thereof given, yet execution of the ſaid damages ſtill remains to be made to the ſaid *A.* Whereupon the ſaid *A.* hath beſought us, that a proper remedy may be provided for him in this behalf: And we, being willing that what is juſt ſhould be done in this behalf, do command you, that, by good and lawful men of your bailiwick, you make known to the ſaid *C.* that he be before us on ——— *whereſoever we ſhall then be in England**, to ſhew if any thing he has or knows to ſay for himſelf, why the ſaid *A.* ought not to have his execution againſt him

* A *ſci. fa quare executionem non* on error from *C. B.* and all other writs and proceſs, muſt be returnable on a *general return ubicunque*, and have fifteen days between the *teſte* and *return*, *i. e.* between the *teſte* of the firſt, and *return* of the ſecond writ.

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of the damages aforeſaid, according to the force, form, and effect of the ſaid recovery, if it ſhall ſeem expedient to him; and further to do and receive, what in our ſame court before us ſhall be conſidered of him in this behalf: and have there the names of thoſe by whom you ſhall make known to him, and this writ. Witneſs, *&c.*

If plaintiff in error does not aſſign his errors, when the tranſcript is brought in, the defendant has no way to quicken him, but by a *ſci. fa. quare executionem non*; for upon the removal of the record, the parties have no day in court given to either. *Carth.* 40.

If *nihil* is returned to this writ, the *defendant in error* may ſue out an *alias ſcire facias*, which differs only from the above in this, that it is ſaid, "do command you as before we have commanded you, that by good and lawful men, *&c.*"

If a *ſcire feci* is returned to the former writ, or there be a *nihil* alſo returned to the latter, the *defendant* in error muſt enter a rule with the *clerk of the rules*, which is given in the ſame manner as a rule to plead, and which expires in *four days* *. After the expiration of which, if the *plaintiff* in error has neglected to aſſign errors, the *defendant* may enter an award of execution on the roll for the amount of the judgment below; but then the defendant in error is not entitled to coſts, nor is the *plaintiff* thereby precluded from proceeding in his *writ of error*, but may afterwards proceed therein and aſſign his errors, even though execution be actually executed; and in ſuch caſe, after aſſignment of errors, joinder in error, and argument thereon, if the judgment given below be reverſed above, the *plaintiff* in error ſhall have reſtitution of all he hath loſt by reaſon of the execution.

On motion to ſet aſide an execution taken out upon a judgment in a *ſcire facias quare ex. non*, becauſe they had aſſigned errors before. On reference to the maſter, he reported an old rule, that if the party pleads to the *ſcire facias*, and it goes againſt him, execution may be ſued out; but that the writ of error ſhall go on notwithſtanding. Whereupon the court, in conſideration of the delay, eſtabliſhed it as a ſtanding rule, for the future, that if, upon the return of the *ſcire facias*, the plaintiff aſſigns his errors, then all farther proceedings ſhall be ſtayed

* But defendant in error cannot give a rule to aſſign errors before he has given a rule on the *ſci. fac. quare ex. non.* *Stra* 917.

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upon it; but where he chuſes to ſtand out upon pleadings to the *ſcire facias*, execution ſhall go if it be adjudged againſt him. *Gardner* v. *Claxton*. *Stra*. 391. *Vide* alſo *Stra*. 679.

To a *ſci. fa. quare ex. non* ſued out by defendant in error, in order to compel plaintiff to aſſign his errors, the plaintiff in error pleaded, that the defendant had ſued execution in the *Common Pleas*, and levied his debt recovered. On motion, this plea was ſet aſide as a ſham plea [as a plea of payment in the like caſe was], for the meaning of ſuing out this writ is only to compel the plaintiff in error to aſſign his errors; and if ſuch pleading as this ſhould be encouraged, it would occaſion great delays and vexation in the recovery of debts. *Parker* v. *Staunton*. *Ld. Raym*. 1414.

Motion to quaſh a *ſci. fa. quare ex. non* ſued out by defendant in error, to make plaintiff aſſign, becauſe the original ſuit in *C. P.* was by *bill of privilege*, and the *ſci. fa.* therefore ought to be made returnable on a day certain, but this was returnable on a common return. And of that opinion was the court, becauſe *ſcire facias*'s ought always to be made returnable according to the original ſuit below. And in *Trin.* 11 *Anne*, between *Vavaſor* and *Parker*, it was adjudged ſo by the *King's Bench*, in a ſimilar caſe. The writ was quaſhed. *Eden* v. *Wills*. *Ld. Raym*. 1417.

It ſeems to be the practice now to admit of no plea by the plaintiff in error to the *ſci. fa. quare ex. non*, ſued out by defendant in error: but plaintiff in error muſt inſtantly aſſign his errors.

Rule to ſhew cauſe why proceedings on a *ſci. fa. quare ex. non*, in *C. B.* brought by the executor of the deceaſed plaintiff below, pending a writ of error, ſhould not be ſtayed. On ſhewing cauſe, it appeared, that the record of the judgment was not tranſcribed into *B. R.* and the *ſci. fa.* out of *C. B.* was therefore held regular. The executor may revive, but cannot take out execution pending error. After a tranſcript the *ſci. fa. quare ex. non*, ſhould go out of *B. R.* Plaintiff in error (if deſirous to proceed) might, after a tranſcript, have a *ſci. fa. aud. errores* out of *B. R.* againſt the executor or adminiſtrator of the deceaſed plaintiff below. Rule diſcharged. *Barnes*, 432.

After the record removed into *B. R.* plaintiff in error for ſome time neglected to ſue out a *ſci. fa. ad aud. errores*. Whereupon plaintiff, in the original action, ſued out a *ſci. fa. quare ex. non*, and upon two *nihils* had judgment and execution executed. Afterwards, plaintiff in error moved to ſet aſide this judgment on the *ſci. fa.* becauſe his errors were aſſigned on the record;

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record; and on examination it appeared they were aſſigned without any notice. *Per Holt*, c. j. The parties, upon the removal of the record by writ of error, have no day in court given to either: Wherefore, if plaintiff in error delay to ſue his *ſci. fa. ad aud. errores*, the defendant hath no way to compel him, but by a *ſci. fa. quare ex. non*; and if upon ſuch *ſci. fa.* plaintiff in error doth not plead, that his errors are aſſigned, but ſuffer judgment to paſs upon two *nihils*, no errors afterwards aſſigned ſhall prevent execution.

The uſual practice is, that defendant in error by conſent doth voluntarily take notice of the aſſignment of errors; and this conſent is teſtified by his pleading *in nullo eſt erratum*, and there is no occaſion for a *ſci. fa. ad aud. errores*. *Moſely* v. *Cocks*. *Carth.* 40.

In *Lynch* v. *Coote*, 3 *Salk.* 145. it was held by *Holt*, c. j. that if plaintiff in error lie ſtill after a writ of error brought, this is no diſcontinuance of the writ. And that defendant in error hath no other way, but to bring a *ſci. fa. quare ex. non*; and it will be no plea for plaintiff to plead, that there is a writ of error depending, but he muſt forthwith aſſign his errors, after ſuch *ſci. fa.* brought. And in this caſe there is this difference, *viz.* if the *ſci. fa.* is entered on the ſame roll with the writ of error, then he may aſſign his errors without ſuing forth a *ſci. fa. ad aud. errores* for defendant in error to come in and hear the errors aſſigned: otherwiſe he muſt ſue out a *ſci. fa. ad aud. errores*, to give defendant in error notice.

Where a writ of error is brought, and no record certified at the day of the return of the writ, the defendant in error ſhould take out a *certificate* thereof from the proper officer of the court with whom the record ought to be lodged, with the return of the writ of error; and upon obtaining ſuch *certificate*, he may take out a writ *de executione judicii* of courſe; and the party cannot hinder execution thereupon, without he brings a new writ of error. 3 *Salk.* 146.

When the record is certified, and plaintiff does not aſſign his errors, upon the *ſci. fa. quare ex. non*, defendant's beſt method of proceeding is to *nonpros* the writ of error.

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TO prevent the *plaintiff* in error from re-aſſuming the proceedings after the rule is out, upon default made upon the *ſcire feci*, or upon two *nihils* returned to the *ſci. fa. quare ex. non*, the better way for the *defendant* in error to proceed is, to *nonpros* the writ of error; which is done, by getting another rule from the maſter [after the former rule is out] upon the back of the tranſcript of the record for the *plaintiff* in error to aſſign errors *de recordo*. Enter this rule with the *clerk of the rules*, and ſerve a copy thereof on the *plaintiff* in error's attorney; upon which, if the *plaintiff* in error does not aſſign his errors within four days, the defendant may ſign a *nonpros*, and then may have his *coſts* taxed and allowed.

The entry of a *nonpros in error* from an inferior court, after two *ſcire facias*'s and *nihils* returned, is in this manner:

Hilary term, twentieth of *George* the Third.

" *England*, to wit. *C. D.* puts in his place *William Lyon*, his attorney, to proſecute his writ of error againſt *A. B.* in a plea of *treſpaſs on the caſe*.

" *England*, to wit. The ſaid *A. B.* puts in his place *George Hodgſon*, his attorney, againſt the ſaid *C. D.* on the ſaid writ of error in the plea aforeſaid.

" *England*, to wit. Our lord the king hath ſent to the judges of his court of ——— [name the inferior court] his writ cloſe in theſe words, " to wit," *George* the Third, *&c.* [here copy the writ of error, and the tranſcript of the record, according to the office copy thereof], afterwards, to wit, on ——— next after the *Octave of Saint Hilary*, in this ſame term, before our lord the king at *Weſtminſter*, comes the ſaid *A.* by his attorney aforeſaid, and ſays, that execution of the ſaid judgment ſtill remains to be made to him; therefore he prays the writ of our lord the king, to be directed to the ſheriff of the ſaid county of ——— to warn the ſaid *C.* to be before our lord the king, whereſoever, *&c.* to ſhew if any thing he has or knows to ſay for himſelf, why the ſaid *A.* ought not to have his execution thereof againſt him of his damages, coſts, and charges aforeſaid, according to the force, form, and effect of the ſaid recovery; and it is granted to him, *&c.*

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&c. by which it is commanded to the ſheriff of the county of ——, that by good and lawful men of his bailiwick he make known to the ſaid *C.* that he be before our lord the king on —— whereſoever, &c. to ſhew in form aforeſaid, if, &c. And further, &c. the ſame day is given to the ſaid *A.* &c. at which day, before our lord the king at *Weſtminſter*, the ſaid *A.* comes by his attorney aforeſaid, and the ſheriff of the ſaid county of ——, to wit, *O. P.* Eſquire, returns, that the ſaid *C.* hath nothing in his bailiwick, by which he can make known to him; nor is he found in the ſame: *Therefore*, as before, it is commanded to the ſheriff of —— aforeſaid, that by good and lawful men, &c. he make known to the ſaid *C.* that he be before our lord the king, on —— whereſoever, &c. to ſhew in form aforeſaid, if, &c. And further, &c. the ſame day is given to the ſaid *A.* &c. at which day, before our ſaid lord the king at *Weſtminſter*, the ſaid *A.* comes by his attorney aforeſaid; and the ſheriff of the ſaid county of —— to wit, the ſaid *O. P.* Eſquire, likewiſe returns, that the ſaid *C.* hath nothing in his bailiwick, by which he can make known to him, nor is he found in the ſame: and the ſaid *C.* although on *the fourth day* ſolemnly required, came not, but made default: and upon this the ſaid *A.* ſaith, that the ſaid *C.* hath not yet aſſigned error or errors in the ſaid record and proceedings. Therefore a day is given to the ſaid parties, before our lord the king at *Weſtminſter*, until, &c. —— [the day in the rule given by the maſter], to wit, to the ſaid *C.* to aſſign error or errors in the ſaid record and proceedings, &c. At which day, before our lord the king at *Weſtminſter*, the ſaid *A.* comes by his attorney aforeſaid; and the ſaid *C.* at that day, although ſolemnly demanded, comes not, but makes default; nor doth he further proſecute his ſaid writ of error againſt the ſaid *A.* It is therefore conſidered, that the ſaid *C.* be in mercy, and that the ſaid *A.* have therefore his execution againſt the ſaid *C.* of his damages, coſts and charges, according to the force, form, and effect of the ſaid recovery, &c. and it is further conſidered,

Scire facias awarded.

Nihil returned.

Alias ſcire facias awarded.

Nihil returned.

Day given to aſſign errors.

Judgment.

Of proceeding in Error from INFERIOR Courts, and herein of NON-PROSSING the Writ of Error.

that the ſaid *A.* recover againſt the ſaid *C.* ——— pounds, adjudged to the ſaid *A.* by the court of our ſaid lord the king now here, according to the form of the ſtatute, for his damages, coſts and charges, which he hath ſuſtained by occaſion of the delaying the execution of the ſaid judgment, by pretence of proſecuting the ſaid writ of error, and that the ſaid *A.* likewiſe have execution thereupon, *&c.*

The bail in error are liable in caſe of a *nonpros*; *Barnes*, 71. for they are bound to proſecute the writ of error with effect. *Ibid.* 499.

Of proceeding in Error from INFERIOR Courts, and herein of aſſigning Errors, and making up the Error-book, &c.

IF the *plaintiff* in error appears and proceeds, the next ſtep is to *aſſign* errors. An *aſſignment* of errors may be either general or ſpecial, and in either caſe muſt be ſigned by counſel.

The plaintiff may aſſign for error, error *in fact*, or *error in law*. *F. N. B.* 20. *e.* But he cannot aſſign both, for this will be double. 1 *Rol.* 761. *l.* 35. 1 *Lev.* 105. 76. 1 *Sid.* 147.

Nor can he aſſign ſeveral errors *in fact*, but he may ſeveral errors *in law*. *F. N. B.* 20. *e.*

In error from an *inferior* court, the plaintiff in error cannot alledge diminution of the record. *Sid.* 40. 147. Nor can the defendant; but the court, if they ſee occaſion, may award a *certiorari ad informandum conſcientiam.*

Nor can he aſſign for error matter contrary to the record. *Cro. Jac.* 21. 1 *Lev.* 76. 1 *Salk.* 262. 1 *Lev.* 313. *Cro. Jac.* 244.

Nor matter which he might have pleaded. 1 *Rol.* 762. *l.* 40. Though judgment were by default. Though *Dub. Cro. Jac.* 547.—But *Carth.* 124. ſays—Not matter which might have been pleaded in *abatement.*

An *aſſignment* of errors is in the place of a declaration in error, and muſt be engroſſed and delivered over to the defendants on treble-penny ſtamped paper; the entry whereof is in this form:

Hilary term, twentieth *George* the Third.

Stormont and *Way.*

"*And* the ſaid *C.* by *William Lyon*, his attorney, comes and ſays, that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid, there is manifeſt error in this; to wit, That the declaration aforeſaid, and the matters therein contained, are not ſufficient in law for the ſaid *A.* to maintain his ſaid action againſt the ſaid *C.* There is alſo error in this, that by the record aforeſaid here ſent, it appears, that the judgment aforeſaid, in the plea aforeſaid, in form aforeſaid given, was given for the ſaid *A.* when by the law of the land of this kingdom of *England*, judgment in the plea aforeſaid ought to have been given for the ſaid *C.* againſt the ſaid *A.* and ſo the judgment aforeſaid is erroneous; and hereupon the ſaid *C.* alſo prays, that the judgment for the ſaid errors, and other the errors in the record and proceedings aforeſaid, may be reverſed, annulled, and ſet aſide, and that he may be reſtored to all things which he hath loſt by occaſion of the ſaid judgment, *&c.*" *George Bond.*

Of proceeding in Error from INFERIOR Courts, and herein of aſſigning Errors, and making up the Error-book, &c.

If plaintiff in error moves to amend his aſſignment of errors, it is always on payment of coſts, for he comes for a favour of the court. *Fitzgib.* 268.

The tranſcript on record ought to be entered by the *plaintiff* in error the ſame term it is brought into the office; but if he neglects ſo to do, the *defendant* in error may enter it.

As ſoon as the *tranſcript* is entered, and the *plaintiff* hath alſo aſſigned his errors, and entered the ſame on record; and if the defendant does not immediately plead, or join in error, the *plaintiff* may ſue out a *ſcire facias ad audiendum errores*, which is to this effect:

GEORGE the Third, *&c.* To the ſheriff of ——— greeting: Foraſmuch as in the record and proceedings, and alſo in the giving of the judgment in a certain plaint lately levied in our court of ——— before the judges of the ſame court between *A. B.* and *C. D.* of a plea of *treſpaſs on the caſe*, manifeſt error, as it is ſaid, hath intervened to the great damage of the ſaid *C.* as by his complaint we are informed; which ſaid record, and proceedings therein, we have, for certain reaſons, cauſed to come in our court before us; and we, being willing, if any error there be, to correct the ſame, and to do unto the parties aforeſaid full and ſpeedy juſtice in this behalf, do command you, that, by good and lawful men of your bailiwick, you make known to the ſaid *A.* that he be before us in ——— whereſoever we ſhall then be in *England*, to hear the proceedings aforeſaid, if it ſhall ſeem expedient unto him; and further, to do and receive what in our ſaid court before us ſhall be conſidered of him in this behalf, and have there the names of them by whom you ſhall make known unto the ſaid *A.* as aforeſaid; and this writ. Witneſs, *&c.*

If the *defendant* in error does not come in and plead, or join to the aſſignment of errors upon the return of the *ſcire facias ad audiendum errores*, the plaintiff may have an *alias ſcire facias*, *&c.* and upon default thereto, the *plaintiff* in error muſt proceed to argument, and will be heard *ex parte*.

After judgment for the defendant the plaintiff brought error and aſſigned infancy in defendant, and appearance by attorney; then took out a *ſci. fa. ad aud. errores*; and after a *ſcire feci* returned, entered the default; and on producing the record, the judgment was reverſed on motion, without making it a *concilium* or putting it in the paper. *Walmſley* v. *Roſon. Stra.* 1210.

Of proceeding in Error from INFERIOR Courts, and herein of aſſigning Errors, and making up the Error-book, &c.

If the errors aſſigned are *ſpecial*, the joinder in error muſt be ſigned by counſel, and ingroſſed on ſtamped paper, and then delivered over to the plaintiff's attorney: but if the errors aſſigned are *general*, the defendant's attorney may join in error directly, and deliver the common joinder *in nullo eſt erratum*, on a treble penny ſtamped paper, to the plaintiff's attorney, paying him 2*s.* 4*d.* for entering the ſame on record.

Stormont and *Way*.

Hilary term, twentieth *George* the Third.

A. B. }
ats. } There is not any error.
C. D. }

George Hodgſon, attorney for the defendant in error.

The joinder of "*in nullo eſt erratum*" to an aſſignment of error in *fact*, is a confeſſion thereof, if the error in fact be well aſſigned; for if error in fact be aſſigned, and the defendant in error would deny it, he ſhould not join *in nullo eſt erratum*; but ought to take iſſue upon it, ſo as to have it tried by the country. *Sid.* 93. *Raym.* 59.

But if the aſſignment is of an error in *fact*, and that be ill aſſigned, "*in nullo eſt erratum*" is no confeſſion of it; as if it be aſſigned, that ſuch a one, at the time of the return of the *venire*, was not ſheriff, and the record be removed; there, *in nullo eſt erratum* is no confeſſion of that *fact*; becauſe the record thereof is not in court, that being no part of the record, for the plea is *in nullo eſt erratum in recordo*. *Cro. Jac.* 12. 29. 521. *Raym.* 231. *Cro. Car.* 421. *Rol. Abr.* 758.

Alſo if an error in *fact*, that is not aſſignable, be aſſigned, and *in nullo eſt erratum* be pleaded, it is no confeſſion; as if it be aſſigned, that on ſuch a day there was no court ſitting; becauſe that is againſt the record, and then *in nullo eſt erratum* is only a demurrer. So if a man ſays, he did not appear, and the record ſays he did, *in nullo eſt erratum* is no confeſſion, but a demurrer, becauſe it is againſt the record. *Vide Bac. Abr.* title *Error*, 2 *vol.* 218. and authorities there cited.

If the plaintiff in error therefore aſſigns error in *fact*, which is aſſignable, and the defendant would not confeſs it, he muſt not join *in nullo eſt erratum*, but plead thereto, and then the parties go to iſſue upon the error in fact, the record is made up, as in other caſes, and the matter goes to a jury.

Of proceeding in Error from INFERIOR Courts, and herein of aſſigning Errors, and making up the Error-book, &c.

But where the defendant joins *in nullo eſt erratum*, the parties thereupon are at iſſue in law for the determination of the court; and in ſuch caſe either of them may enter the ſame on record, and move for a *concilium*, or day, for arguing the errors. Then the cauſe for argument muſt be entered with the clerk of the papers, and error-books made up and delivered to the reſpective judges of the court, in like manner as upon argument of a *demurrer* *.

By pleading *in nullo eſt erratum*, the defendant admits the record to be perfect, and cannot afterwards alledge diminution. 1 *Salk.* 270.

The defendant in error cannot give a rule to aſſign errors, before he has given a rule on the *ſcire facias quare executionem non.*

A rule to aſſign errors was ſet aſide, becauſe given before any rule on the *ſcire facias quare executionem non. Marſhal* v *Cope. Stra.* 917.

If the *plaintiff* in error, on being ſerved with a rule for that purpoſe, aſſigns his errors, and the defendant joins *in nullo eſt erratum*, in making up the record, purſue the foregoing precedent of a *non-proſs* as far as the day given upon the rule, and then go on with the *joinder in error, &c.* in the following manner:

"*Whereupon* the ſaid *A. B.* by *George Hodgſon*, his attorney, comes and ſaith, that neither in the record and proceedings aforeſaid, nor in the giving of the judgment aforeſaid in any thing is there error; and he prayeth, that the court of our lord the king now here may proceed to the examination, as well of the ſaid record and proceedings aforeſaid, as of the matters aforeſaid above aſſigned for error; and that the judgment aforeſaid may be in all things affirmed. But becauſe the court of our ſaid lord the king now here are not yet adviſed of giving their judgment of and upon the premiſes, therefore a day is given to the ſaid parties to be before our lord, until, *&c.* —— whereſoever, *&c.* to hear judgment thereof; for that the court of our ſaid lord the king is not yet adviſed thereof: at which day came here into court, as well the ſaid *C.* as the ſaid *A.* by their attornies aforeſaid; upon which the premiſes being conſidered, as well the record and proceedings aforeſaid, as the judgment aforeſaid on the ſame given, and

* For the inſtructions to do which, *vide* title *Demurrer*, &c. in the firſt vol.

the

Of proceeding in Error from INFERIOR Courts, and herein of aſſigning Errors, and making up the Error-book, &c.

the cauſes before for error aſſigned, being by the court of our lord the king here diligently examined, and fully underſtood; it ſeemeth unto the court of our ſaid lord the king here, that the judgment aforeſaid is not in any wiſe vicious or defective; and that in the ſaid record there is not any thing erroneous. Therefore it is conſidered by the ſaid court of our lord the king, before the king himſelf now here, that the judgment aforeſaid in all things be affirmed, and do ſtand in its full force and effect (the ſaid cauſes above for error alledged in any thing notwithſtanding); and it is further conſidered, that the ſaid *A. B.* do recover againſt the ſaid *C. D.* ſixteen pounds ten ſhillings, by the court of our ſaid lord the king now here adjudged to the ſaid *A.* at his requeſt, for his coſts and charges which he hath expended by reaſon of the delay of the execution of the ſaid judgment, and by the proſecution of the ſaid writ of error."

Upon affirmance of the judgment, the *defendant* in error may take out his execution, either a *fi. fa. ca. ſa.* or *elegit*—which writ of execution recites the former judgment below, the removal of the record into the court above, and the affirmance thereof, together with the coſts given upon the affirmance.

If judgment was given below for the *defendant*, and the *plaintiff* brings *error*, and thereupon the court reverſes the former judgment, the court above gives ſuch judgment as the court below ought to have given—and then there is no *coſts* upon the *writ of error*, but only the coſts of the original action given. *Wyvill* v. *Stapleton*. *Stra.* 617.

On *writs of error* from inferior courts, the ſuperior court takes notice of the laws and cuſtoms of inferior courts; but otherwiſe upon removal of a cauſe by *habeas corpus*. *Salk.* 269

On error into *B. R.* of a judgment in an *inferior* court it was reverſed for want of an averment in the declaration, that the cauſe of action aroſe within the juriſdiction. *Ld. Raym.* 1310. 2 *Wilſ.* 16.

Of proceeding in Error from the Court of Common Pleas into the King's Bench.

IF an erroneous judgment is given in the *Common Pleas*, the *writ of error*, in all cases, is made returnable into the court of *King's Bench*.

In order to bring error, the attorney for the party suing it finds the number of the judgment roll from the docquet of the prothonotary's office, and thereby finds the roll in the treasury, of which he makes a copy, and thereupon the cursitor makes out the *writ of error*. *Comp. Att.* 63. Which may be sued out before judgment, but judgment must be given before the return of it. 3 *Keb.* 308. *Vent.* 96. *Latch.* 133.

When the *writ of error* is obtained from the *cursitor*, you must get it sealed, and then carry it to the *clerk of the errors*, and pay him his fee for the allowance of it, who will give you a notice in writing of such allowance; after which you should serve the other party's attorney with a copy of the writ, and allowance thereof, which should be served immediately; for till it is served, it is no *supersedeas* to the execution; nor is it a *supersedeas* in many cases, unless *bail* be put in by the party suing the *writ of error*.

Of

Of Bail in Error, where requiſite.

THERE are ſeveral ſtatutes requiring *bail* to be given by the party proſecuting error to reverſe a judgment; in order to underſtand which, I ſhall ſtate the ſtatutes in their order, and give ſeveral of the determinations of the courts upon thoſe ſtatutes.

The firſt ſtatute requiring bail on *error*, is the 31 *Eliz. c.* 2. *ſ.* 3. which enacts, "That before any allowance of any writ of error, or reverſing of any *outlawry* be had by plea or otherwiſe, through or by want of any *proclamation* to be had or made according to the form of this ſtatute, the defendant in the original action ſhall put in bail, not only to appear and anſwer to the plaintiff in the former ſuit in a new action to be commenced by the ſaid plaintiff, for the cauſe mentioned in the firſt action, but alſo to ſatisfy the condemnation, if the plaintiff ſhall begin his ſuit before the end of *two terms* next after the allowing the writ of error, or otherwiſe avoiding of the ſaid outlawry.

The next ſtatute, requiring *bail on error*, is the 3 *Jac.* 1. *c.* 8. entitled, "An act to avoid unneceſſary delays of execution"—whereby it is enacted, "That no execution ſhall be ſtayed or "delayed upon or by any writ of error, or *ſuperſedeas* there-"upon to be ſued for the reverſing of any judgment given in "any action or bill *of debt upon any ſingle bond for debt*, or upon "any obligation with condition *for the payment of money only*; or "upon any action or bill *of debt for rent*, or upon any contract "ſued in any of his highneſs's courts of record at *Weſtminſter*, "or in the counties palatine of *Cheſter*, *Lancaſter*, and *Dur-"ham*; or in the courts of great ſeſſions in any of the twelve "ſhires of *Wales*, unleſs ſuch perſon or perſons, in whoſe "name or names ſuch writ of error ſhall be brought, with two "ſufficient ſureties, ſuch as the court (wherein ſuch judgment is "or ſhall be given) ſhall allow of, ſhall firſt, before ſuch ſtay "made or *ſuperſedeas* to be awarded, be bound unto the party "for whom any ſuch judgment is given, by recognizance to "be acknowledged in the ſame court, in double the ſum ad-"judged to be recovered by the ſaid former judgment, to pro-"ſecute the ſaid writ of error with effect; and alſo to ſatisfy "and pay (if the ſaid judgment be affirmed) all and ſingular "the debts, damages, and coſts, adjudged upon the former "judgment; and all coſts and damages to be alſo awarded "upon the delaying of execution."

This ſtatute requires only bail to be given upon error to reverſe any judgment of *debt upon any ſingle bond for debt, or obligation*

Of Bail in Error, where requiſite.

gation with condition for payment of money only, or action of debt for rent, or upon contract.

Therefore *bail in error* on a judgment in debt on bond, are each bound in the ſum recovered, that being double the ſum due. 1 *Will.* 213.

But *bail* is not requiſite upon bringing a writ of error upon a judgment in an action of debt founded upon a prior judgment. *Biddleſon* v. *Whytell. Burr. Rep.* 4 *pt.* 1548. becauſe this is *caſus omiſſus* out of this act, which is to be taken literally and not extended by conſtruction. *Ibid.* and 1 *Blackſ. Rep.* 506.

A bond given by a third perſon, to a third perſon, as collateral ſecurity for a debtor's paying his creditors 15 *s.* in the pound upon a liquidated total of his debts, is a bond with condition for the payment of money only within this act——Therefore bail requiſite. *Burr. Rep.* 4 *pt.* 746.—And its being payable by inſtalments makes no difference.

No bail is requiſite in bringing a writ of error upon a judgment in debt on bond conditioned for *performance of covenants*, or *upon a bail-bond*——becauſe theſe bonds are not conditioned *for the payment of money only.*

But if the defendant brings error after judgment againſt him in an action upon a *bottomree bond*, he muſt put in bail; becauſe the contingency having happened, this is now, in every reſpect, a bond for the payment of money. *Stra.* 476.

Motion for leave to take out execution, no bail being put in on a writ of error brought by defendant, the action being in debt on bond, conditioned only for payment of money according to the true intent and meaning of an indenture, and not performance of covenants. On ſhewing cauſe, the court held that bail was required by 3 *Jac.* 1. If the bond had been generally for performance of covenants in an indenture, and the only covenant in that indenture had been for payment of money, bail muſt have been given on error. But the court gave time to put in bail. *Barnes*, 98.

The condition of a bond was for the payment of 500 *l.* at ſuch a day, being the ſum mentioned in certain indentures of ſuch a date. And error being brought, the plaintiff in error would have been excuſed from giving bail, becauſe the words of 3 *Jac.* 1. are, "*bonds for payment of money only*;" whereas, this was rather a bond for performance of covenants. But the court held, that bail ought to be given; for the material part of the condition was the payment of 500 *l.* and the other

Of Bail in Error, where requiſite.

words were only added to ſhew they were not diſtinct debts, but only different ſecurities for the ſame. *Diſboſdes* v. *Horſey*. *Stra.* 959.

Action upon an *inſimul computaſſent* in *C. B.* error brought in *B. R.* after judgment for the plaintiff—and upon the queſtion of bail being requiſite—*Per Cur.* This caſe is out of the ſtatute, for the debt recovered did not accrue by any contract or other duty certain at firſt, but merely upon an account between the parties, which account has reduced divers uncertain ſums to one certainty—Therefore, as the action was founded upon the account, which is uncertain, this caſe is out of the ſtatute.———The ſame law in debt, upon an award, when the arbitrators have reduced divers controverſies to be recompenſed by one ſum: though this is a debt, yet it is not ſuch a one as is intended by the ſtatute, which muſt be a debt certain at firſt. *Yelv.* 227. 2 *Bulſt.* 53.

The original action was in debt on *bond* conditioned to pay ſo much money as *J. S.* ſhould declare to be due on an account; and, after pleadings below, error was brought on the judgment. And by all the judges, except *Keeling*, the *plaintiff* in error muſt put in bail, or execution may go; for this obligation is made for the *payment of money only*, which, though not certain when the obligation was made, is yet certain before the action brought. 1 *Lev.* 117. 1 *Keb.* 613. 690.

The condition of a bond was to perform *covenants* in an indenture; and among the reſt was one *for payment of money*, and the other were collateral; and the breach aſſigned was *for the non-payment of the money*: Yet, on error brought upon the judgment, no bail was taken; for *per Holt*—this is not a condition *for the payment of money only*, but to do collateral acts. It is true, the breach aſſigned is *for not paying the money*; and therefore, the caſe upon the pleadings is the ſame as if the condition had been for the payment of money only, yet the *condition* is not for payment of money *only*. *Carth.* 28.

The condition of a bond was to pay for ſo much beer as ſhould be delivered to *S.* not exceeding 100 *l.* After judgment upon demurrer below, error was brought. *Et per Cur.* No bail requiſite. This ſum was not *certain* even at the time of the action brought. *Thrale* v. *Vaughan*. *Stra.* 1190. 1 *Wilſ.* 19.

But if an action of debt be brought on a bond, conditioned for the performance of covenants, and the defendant lets judgment go by default, without craving oyer of the condition,

Of Bail in Error, where requiſite.

dition, and after brings error, he muſt put in bail; becauſe it does not appear to the court upon the record, that the condition was for performance of covenants. This is the practice in *B. R.*

But in *C. B.* it is otherwiſe, as appears by the following caſe. Plaintiff declared in debt on a bond, of which defendant craved *oyer*; and the condition appeared to be for performance of *covenants*. Defendant after *oyer*, inſtead of pleading, entered *nil dicit*; in order that *oyer* of the condition appearing upon record, he might bring a writ of error without bail. The court, on hearing counſel, ſet aſide this entry, and gave plaintiff leave to enter judgment by *default*. And the queſtion then was, whether the condition of the bond not appearing on record, bail ought to be required on the writ of error or not? And the court held, that the matter of bail is properly examinable by affidavit; and the bond being conditioned for performance of covenants, bail ought not to be required. *Spinks* v. *Bird. Barnes*, 72.

Motion for bail upon error in an action of debt on bond, conditioned for payment of 300 *l.* mentioned in a ſurrender of a copyhold by way of mortgage, and not for performance of covenants, wherein judgment had paſſed by default. *Per Cur.* There muſt be bail. This caſe is out of the ſtat. 16 & 17 *Car.* 2. but within the ſtat. 3 *Jac.* 1. *Barnes*, 78.

By the 13 *Car.* 2. *c.* 2. [reciting the ſtatute of 3 *Jac.* 1. in the 8 *ſect.*], 9 *ſect.* enacts, "That no execution ſhall be "ſtayed in any of the courts aforeſaid *, by any writ or writs "of error, or *ſuperſedeas* thereupon, *after any verdict and "judgment thereupon obtained in any action of debt* grounded "upon the ſtatute made in the ſecond year of the reign of "the late king *Edward* the Sixth, for not ſetting forth of "tythes; *nor in any action upon the caſe upon any promiſe for "payment of money*, actions *ſur trover*, actions of *covenant*, de-"tinue and treſpaſs, unleſs ſuch recognizance, and in ſuch "manner, as by the ſaid recited former act is directed, ſhall "be firſt acknowledged in the ſaid court where ſuch judgment "is given."

Sect. 10. "Gives double coſts to a defendant by delay of "execution by reaſon of error brought, if the judgment be "affirmed."

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* *i. e.* The courts mentioned in the ſtatute of *Jac.* 1.

Sect.

Of Bail in Error, where requiſite.

Sect. 11. "Provides that the ſaid ſtatute ſhall not extend to "actions popular; or upon penal ſtatutes, indictments, *&c.* "other than the ſtatute of *Edward* the Sixth mentioned."

By the 16 *&* 17 *Car.* 2. *c.* 8. *ſ.* 3. it is enacted, "That "no execution ſhall be ſtayed in any of the aforeſaid courts *, "by writ of error or *ſuperſedeas* thereon, *after verdict* and "judgment thereupon, in any action perſonal whatſoever, "unleſs a recognizance, with condition according to the "ſtatute made in the third year of king *James* the Firſt, ſhall "be firſt acknowledged in the court where ſuch judgment "ſhall be given:" And further, "That in writs of error to "be brought upon any judgment after *verdict* in any writ of "*dower*, or in any action of *ejectione firmæ*, no execution ſhall "be thereupon or thereby ſtayed, unleſs the plaintiff or plain-"tiffs in ſuch writ of error ſhall be bound unto the plaintiff in "ſuch writ of *dower*, or action of *ejectione firmæ*, in ſuch reaſon-"able ſum as the court to which ſuch writ of error ſhall be "directed ſhall think fit; with condition, that if the judg-"ment ſhall be affirmed in the ſaid writ of error, or that "the ſaid writ of error be diſcontinued in the default of the "plaintiff or plaintiffs therein, or that the ſaid plaintiff or "plaintiffs be nonſuit in ſuch writ of error, that then the ſaid "plaintiff or plaintiffs ſhall pay ſuch coſts, damages, and ſum "and ſums of money as ſhall be awarded upon or after ſuch "judgment affirmed, diſcontinuance, or nonſuit had."

And by *ſect.* 4. "To the end that the ſame ſum and ſums "and damages may be aſcertained," it is enacted, "That the "court wherein ſuch execution ought to be granted, upon "ſuch affirmation, diſcontinuance, or nonſuit, ſhall iſſue a "writ to enquire as well of the meſne profits, as of the "damages by any waſte committed after the firſt judgment in "*dower*, or in *ejectione firmæ*; and upon the return thereof, "judgment ſhall be given, and execution awarded for ſuch "meſne profits and damages, and alſo for coſts of ſuit."

Provided, "That this ſtatute ſhall not extend to any "writ of error to be brought by any executor or admini-"ſtrator, nor any action popular or upon a penal ſtatute (ex-"cept the ſtatute of *Edward* the Sixth), nor upon indict-"ments, *&c.*"

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* The ſame courts as are mentioned in the ſtatute of *James* 1. viz. *the courts at Weſtminſter, courts of the counties palatine, and great ſeſſions.*

The

Of Bail in Error, where requiſite.

The rule upon *error* brought after verdict in *ejectment for rent*, is to juſtify *bail* in double the *rent due*. *Burr. Rep.* 4 *pt.* 2501.

On error in *ejectment*, the plaintiff in error being in a remote part of the kingdom, found two ſufficient men to be his bail, who were bound in a recognizance, *&c.* The court, holding that the intent of this ſtatute of *Charles* the Second being to ſecure the defendant in error, it was here fully obſerved, becauſe this bail was better than the plaintiff's own recognizance. *Barnes* v. *Bulver. Carth.* 121. *Goodtitle* v. *Bennington. Barnes*, 75.

Bail was put in by plaintiff in error in ejectment, but he himſelf was not bound as required by the ſtatute 16 & 17 *Car.* 2. on which, plaintiff below moved for leave to take out execution, and obtained a rule to ſhew cauſe. For plaintiff in error it was urged, that it is become the conſtant practice to give bail by ſureties, and more for the advantage of defendant in error. *Per Cur.* before the ſtatute 16 & 17 *Car.* 2. no bail was required in *dower*, *ejectment*, *&c.* By the ſtat. 2 *Jac.* 1. bail was required in debt only. The ſtat. *of Car.* 2. extends to all perſonal actions after verdict, and requires ſureties. In *dower*, real or mixt actions (and *ejectment* is a mixed action) after verdict it requires the party to be bound. This is a leſs ſecurity than by bail who juſtify, for the party is bound by the judgment. Bail in error cannot be put in before a commiſſioner in the country. The method of the ſtatute cannot be followed without great inconvenience; and a better method, where the party lives at a diſtance from London, is ſubſtituted, and has been the practice ever ſince. Rule diſcharged. *Luſhington and Doe on dem. of Godfrey. Barnes*, 78.

A recognizance on error in *ejectment*, ought to be in the value of two years *meſne profits*; and double coſts is uſually taken in both courts. *Barnes*, 103.

Error on verdict in *ejectment* allowed, but plaintiff in error entered into no recognizance, nor put in bail, as plaintiff below had not got the coſts taxed, without which, the meaſure or *quantum* of the recognizance could not be fixed.—Plaintiff below, for want of the recognizance and bail, *in four days*, took out an *habere facias poſſ.* and had poſſeſſion given him, which the court held to be regular. *Et per Cur.* Defendant ſhould have applied to ſtay execution, and then the court would have obliged plaintiff to have got his coſts taxed. The writ of error is no *ſuperſedeas* without bail. A judge would have taken bail, if applied to. Rule diſcharged. *Barnes*, 212.

Of Bail in Error, where requiſite.

If judgment be againſt an *executor or adminiſtrator de bonis propriis*, and he brings a writ of error, he muſt put in bail in ſuch caſes as are required by the ſtatutes before mentioned, and pay coſts if judgment be affirmed; but if judgment be *de bonis teſtatoris* only, he ſhall neither put in bail nor pay coſts—*vide* the proviſo in 16 & 17 *Car.* 2.

Though an executor is not obliged to give bail on error, yet the court may take it; and if he does give bail, it is binding. *Stra.* 745.

A *ſcire facias* againſt the defendant, as *adminiſtrator* on a *devaſtavit* alledged, and judgment was *de bonis propriis*; on which he brought error; and by the whole court, he ſhall find bail, for here he is charged in his proper goods, and it is not as where an *adminiſtrator* is charged in the teſtator's goods. 1 *Lev.* 245. 1 *Sid.* 368. 2 *Keb.* 295. 371.

After an award of execution againſt *bail* on a recognizance in error, they brought a writ of error as to ſuch award of execution. Plaintiff moved for leave to take out execution for want of bail on the writ of error brought by the bail, and obtained a rule to ſhew cauſe, which was diſcharged; no bail in this caſe being requiſite. *Barnes*, 194.

But in error on a judgment *after verdict* upon a *ſci. fa.* againſt bail, there muſt be bail to the writ of error. 2 *Blackſ. Rep.* 1227. And in this caſe held, that a *ſci. fa.* is a perſonal action, and conſequently within the ſtatute 16 & 17 *Car.* 2. which requires bail on error of a judgment *after verdict* in any action perſonal.

Bail is not requiſite, as it ſhould ſeem [*ſed q.*], upon bringing a writ of error returnable in parliament upon a judgment in *B. R.* in an action of debt brought upon a *recognizance in error*. *Burr. Rep.* 4 *pt.* 1567—8.

But upon error in parliament of a judgment affirmed in *B. R.* new bail is required. *Salk.* 97.

New bail muſt be put in upon every *new writ of error*. *Ld. Raym.* 840.

As if on a judgment in *C. B.* error is brought in *B. R.* where the judgment is affirmed, and afterwards error is brought in parliament, the party muſt give a new recognizance, for the firſt does not include coſts to be aſſeſſed in the *Houſe of Lords*. *Salk.* 97.

Formerly, upon error brought of a judgment in an *inferior* court of record, no bail was neceſſary, as not within either of the foregoing ſtatutes: But now, by 19 *Geo.* 3. *c.* 70. it is enacted,

Of Bail in Error, where requiſite.

enacted, "That no execution ſhall be ſtayed upon or by any "*writ of error* or *ſuperſedeas* thereon to be ſued for the reverſing "of any judgment given in any inferior court of record, where "the damages are under ten pounds, unleſs ſuch perſon, in "whoſe name the writ of error ſhall be brought, with two "ſufficient ſecurities, ſuch as the court [wherein ſuch judg-"ment is given] ſhall allow of, ſhall firſt, before ſuch ſtay "made, or *ſuperſedeas* awarded, be bound unto the party for "whom any ſuch judgment is given, by recognizance to be "acknowledged in the ſame court, in double the ſum adjudged "by the former judgment, to proſecute the ſaid writ of error "with effect; and alſo to ſatisfy and pay [if the ſaid judgment "be affirmed, or writ of error be nonproſſed] all and ſingular "the debts, damages, and coſts adjudged; and all the coſts "and damages awarded for the delaying of execution."

If a writ of error in *B. R.* on a judgment in *C. B.* is amended in *B. R.* new bail muſt be given to the amended writ in *C. B.* and the plaintiff below ſhall not take out execution for want of bail. *Rafael* v. *Verelſt. Eaſt.* 16 *Geo.* 3. *C. B.* 2 *Blackſ. Rep.* 1067.

Bail in Error, when to be put in, &c.

THE *plaintiff* in error has *four days* after the allowance to put in *bail*; and the plaintiff in the action, during that time, ought not take out execution.

Bail muſt be put in within four days after the writ of error allowed, or plaintiff may take out execution. *King's Rep.* 142.

When *bail in error* is put in, notice thereof ought to be given to the defendant or his attorney; and if the defendant does not except to thoſe bail *within twenty days* after ſuch notice, they ſhall be allowed. *Reg. Mich.* 5 *W. & M.*

If the *defendant* in error thinks the bail inſufficient, he may at any time, *within the twenty days*, have a rule from the clerk of the errors for better bail; and after ſervice of ſuch rule, if thoſe bail do not juſtify in *four days*, or better bail is not put in within that time, the *defendant* in error may ſue out execution of his judgment below: But the *writ of error* ſtill remains, and may be proceeded in, the *ſuperſedeas* to the execution only being taken away. Vide *Ld. Raym.* 840.

If a rule for better bail is ſerved in vacation, the *plaintiff* in error has not time, of courſe, to perfect his bail till the next term, but ought to juſtify before a judge: and execution ſued out for want of it was held regular. *Barnes*, 211.

Bail in error, who refuſes to juſtify, may have his name ſtruck out of the bail-piece at any time. *Jones* v. *Tubb*, in error in *B. R.* 1 *Wilſ.* 337.

Objection to one of the bail in error in *C. B.* that he was a palace court officer; but over-ruled, and bail allowed. The rule of this court to prevent ſheriffs officers, and others concerned in the execution of proceſs, from being bail, extends only to proceſs of this court, wherein defendants having been bailed by the officers who arreſted them, were greatly impoſed on and abuſed. *Barnes*, 99. But this caſe was afterwards over-ruled. *Ibid.* 110.

After error allowed and notice, plaintiff in the judgment executed a *fi. fa.* for want of *bail in four days*. Motion to ſet aſide the *fi. fa.* ſuggeſting that plaintiff could not regularly take out execution till after certificate from the clerk of the errors, that no bail was put in. Rule diſcharged. Such certificates have been frequently taken out of caution, but are not eſſentially neceſſary. The ſtat. 16, 17 *Car.* 2. is poſitive as to bail within four days. No bail is yet put in. Bail ought to have been put in before the motion. A queſtion aroſe, whether, after bail perfected, the goods can be reſtored? In *Meriton* v. *Stevens*, *Mich.* 16 *Geo.* 2. and *Sykes* v. *Dawſon*, *Hil.* 18 *Geo.* 2. held, that if defendant's perſon be taken by a *ca. ſa.* and bail in

Bail in Error, when to be put in, &c.

error afterwards perfected, the perſon ſhall be diſcharged: But in caſe of a *fi. fa.* the proceedings, ſo far as the ſheriff has gone, muſt ſtand. *Incledon* v. *Clark.* *Barnes*, 212.

Bail in a writ of error cannot ſurrender their principal in diſcharge of themſelves; for the condition of the recognizance is, that the *plaintiff* in error ſhall proſecute his writ with effect; and, if judgment be affirmed, ſhall ſatisfy and pay the debt, damages, and coſts recovered, together with ſuch coſts as ſhall be awarded by occaſion of the delay of execution; or elſe that they, the bail, ſhall do it for him.

The recognizance of bail in error in *C. B.* has not the condition incorporated with it, as with a recognizance of bail on a *capias ad reſp.* but is ſubſcribed by way of defeaſance to it. Therefore a *ſcire facias*, ſetting out the recognizance, without the condition, was held good, on an iſſue of *nul tiel record* pleaded to it. *Malland* v. *Jenkins.* *Barnes*, 93.

If defendant in error excepts to the bail, and they give notice of juſtification, he muſt not give a rule to tranſcribe before they have juſtified.

Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of tranſmitting the Record.

WHEN the *writ is allowed by the clerk of the errors*, and *bail* put in, according to the foregoing ſtatutes, if the record is not brought in, the *defendant* in error may take out and ſerve the *plaintiff* with a rule to tranſcribe, who muſt, upon ſervice thereof, give inſtructions to the *clerk of the errors* to make up the tranſcript, who does it by the following times:

If the *writ of error* upon a judgment in *C. B.* is made returnable the *firſt* return of term, the clerk of the errors does not bring in the roll till the laſt day of that term.

If it be returnable on any other return of term, he does not bring it in till the firſt day of the ſubſequent term.

If, upon a rule given, the plaintiff in error in *B. R.* does not aſſign errors, and certify the record within eight days, he will be nonſuited.—But the writ cannot be nonproſſed without a rule to aſſign errors. *Burr. Rep.* 4 *pt.* 1772.

The rule to tranſcribe the record was ſerved on plaintiff in error, and for want of tranſcribing, a *nonproſs* was ſigned. Plaintiff in error moved to ſet aſide the *nonproſs*, inſiſting, that the rule to tranſcribe ought to have been ſerved on his known attorney in the cauſe, and not on plaintiff himſelf; and obtained a rule to ſhew cauſe, which was diſcharged, the court declaring the ſervice ſufficient. Rules to tranſcribe are excepted out of the general practice. Service thereof on the party has always been held good. *Green* v. *Upton*. *Barnes*, 410.

In *error* of a judgment in *C. B.* into *B. R.* a *mittitur* is written on the roll, and the record itſelf in all caſes [except in error on a *fine* levied there] is tranſmitted into *B. R.* 1 *Rol. Ab.* 752. *l.* 45. *F. N. B.* 20. *f.* *Stra.* 837.

And the reaſon why the tranſcript only of the record upon error on a *fine* is tranſmitted, is, that in caſe judgment is affirmed, *B. R.* has no *chirographer*, nor can it hold plea in a *quid juris clamat*. 1 *Rol.* 752. *l.* 50. *Dy.* 89. *b.*

When the *record* is brought in and filed in the office of the chief clerk with Mr. *Heberden*, the parties take copies thereof, and the *defendant* in error may ſue out a * *ſcire facias quare executionem non*; and if *nihil* is returned thereto, he may have

* *Vide* the nature and form of *theſe writs ante*, under title, "*Of proceeding in error from inferior courts.*"

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an "*alias*," which writs muſt have * *fifteen days* between the *teſte and return*, if the proceedings were by *original*, and be made returnable on a general return—If by *bill*, as againſt *attornies* in *C. B.* on a day certain in term *ubicumque*.

After the record removed into *B. R.* from *C. B.* by writ of error, defendant died. Plaintiff moved in *C. B.* for leave to ſue out his *ſci. fa.* againſt defendant's executors, and on ſhewing cauſe the rule was diſcharged. The record being removed out of this court, the motion is improper here. *Barnes*, 206.

After a tranſcript from *C. B.* into *B. R.* the *ſci. fa. quare ex. non* ſhould go out of *B. R.* So ſhould the *ſci. fa. ad aud. errores*. *Barnes*, 432.

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* i. e. *Fifteen days* between the *teſte* of the firſt, and *return* of the ſecond.

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IF the record be brought into *B. R.* by the *eſſoign-day* of the term, the writ of *ſcire facias quare, &c.* may bear *teſte* the laſt day of the preceding term; and if brought in within the term, it may be *teſted* the firſt day of the term.

Note: That a *ſci. fa. quare, &c.* may be prayed and ſued by one executor, upon a writ of error brought upon a judgment for him and another, without ſhewing that the other executor is dead. *Burr. Rep.* 4 *pt.* 1791.

If two *nihils* are returned to the *ſcire facias quare*, and *alias*; or *ſcire feci* is returned, and the plaintiff in error does not aſſign errors, the defendant in *error* may get a rule from the *maſter* [by whom all rules in error in *B. R.* after the record tranſmitted and before argument thereon are given] for the *plaintiff* to aſſign *errors*. Upon entering of which rule with *the clerk of the rules*, and ſerving a copy thereof on the plaintiff in error's attorney, if *errors* are not aſſigned *within four days*, the *defendant in error* may * *nonproſs* the *writ of error*, and ſhall have his coſts, according to the ſtatute 8 & 9 *W.* 3. *c.* 11. But without ſuch rule to *aſſign errors*, a writ of error cannot be *non-proſſed*. *Leith* v. *M'Farlan. Burr.* 4 *pt.* 1772.

A rule to aſſign errors was ſet aſide, becauſe given before any rule on the *ſci. fa. quare executio. non. Stra.* 917.

The court will not grant *oyer* of this *ſcire facias*, or allow any plea to it, ſave an aſſignment of errors. *Mich.* 5 *Geo.* 2. *B. R. Miles* v. *Wolſham.*

A *ſcire facias* in error need not lie in the ſheriff's office *four days* before the return of it, as a *ſcire facias* againſt bail muſt. *Groſs* v. *Naſh. Burr. Rep.* 4 *pt.* 2439. *Millar* v. *Yarraway*, *Ib.* 1723.

Error brought, and defendant in error took out a *ſci. fa. quare, &c.* to which the plaintiff in error pleaded, that the damages recovered were levied by *fi. fa.* And on motion the plea was ſet aſide, as it evidently tended to delay; and this writ is only uſed as a method to bring the party to aſſign errors. *Stra.* 679.

A *ſci. fa. ad aud. errores* is not well brought before the record of the judgment be certified into the court, to reverſe which the

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* The form of a *nonproſs*, *vide ante*, under title, "*Of proceeding in error from inferior courts.*"

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writ of error was brought, and errors assigned thereupon: for there is no record in court to warrant the granting of the *sci. fa.* before the record of the judgment is certified, and errors thereupon assigned.

If the first writ of error is *nonprossed*, and then another brought, the court on motion will give leave to take out execution. *King's Rep.* 243.

Rule to shew cause why *nonpross* of a writ of error, for want of transcribing the record, should not be set aside with costs. Objected, that no final judgment is entered, and therefore no transcript could be made. The *nonpross* ordered to be set aside, but without costs. It appeared that the clerk of the judgments was paid his fee, by plaintiff's attorney, for entering the final judgment, which he had neglected to do; but plaintiff did not pray any rule against him. *Stone* v. *Rawlinson in error. Barnes*, 195.

In ejectment, verdict was for plaintiff; whereupon defendant brought error, and entered into a recognizance to pay costs in case of *nonsuit*, *discontinuance*, or *affirmance*, pursuant to the 16, 17 *Car.* 2. *c.* 8. *s.* 3. and it was held, that when *plaintiff* in error is *nonsuited*, defendant need not bring a *scire facias* or *debt* on the recognizance, but may sue out an *elegit*. *Short* v. *Heath*, *B. R. Mich.* 12 *Geo.* 2.

Of

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IF the court of *C. P.* upon a writ of error do not certify all the record, and the *plaintiff* in error alledges diminution, or aſſigns for error, that there is no *original*, or warrant of attorney, and prays a *certiorari*; the *defendant* in error may immediately get a *rule from the maſter* to return the *certiorari*, and ſerve the plaintiff's attorney with a copy thereof; and if it be not thereupon returned and filed in the office within *four days*, the defendant may join in *nullo eſt erratum*, and enter on record a *non miſit breve*, and proceed to argument, as in caſes of *demurrer*.

Where the want of an *original* is aſſigned for error, the plaintiff in error muſt ſue a *certiorari*, unleſs the defendant in error confeſs it. *Salk.* 267.

The caſe was error of a judgment in *C. P.* after a verdict. Want of *original* aſſigned for error, but no *certiorari* taken out to get the want of the *original* certified. *In nullo eſt erratum* pleaded. And when the cauſe came on in the paper, it was objected, that there ought to have been a *certiorari*, and a certificate made of the error; for it might be, that there was an ill original, and if that were returned, the plaintiff in error might take advantage of that, and that would not be helped by verdict, though the want of an original were. *Per Holt*, ch. juſt. If the want of an *original* be aſſigned for error, and the plaintiff in error does not take out a *certiorari*, and get a return to it, and the want of an *original* certified; the courſe is for the defendant to go to the maſter of the office, and get a rule for the plaintiff in error to return his *certiorari*; and if he does not get it done, as ordered by the rule, the aſſignment of error ſtands for nothing. But if the defendant in error will come in *gratis*, and confeſs the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad *original*, *&c.* that is another ſort of error; and when the want of an *original* is aſſigned for error the court will never intend that there is a bad original, and judgment was affirmed. *Smith and others* v. *Stoneard. Ld. Raym.* 1156.

But an original returned by one not ſheriff, is not aſſignable for error. *Salk.* 265.—And irregularity in the return thereof muſt be complained of the ſame term. *Ibid.*

Want of original was aſſigned for error, the defendant, before the return of the *certiorari*, came in *gratis* and pleaded a releaſe

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in bar, to which plaintiff demurred and defendant joined. *Per Cur.* The releaſe is miſpleaded for want of a *venue*, and it was agreed, that the court could award, *ex officio*, a *certiorari ad informandam conſcientiam*, whether there was an original or not.—*Sed Holt cont. Vide Salk.* 268.

So the court can *ex officio* award a *certiorari* to ſupply a defect in the body of the record, even after *in nullo eſt erratum* pleaded. *Salk.* 270.

If a variant original is returned on the firſt *certiorari*, the *defendant* in error may ſue a ſecond *certiorari*. *Salk.* 266.

Continuances cannot be returned upon the ſame *certiorari* with the *original*. *Salk.* 269.

If upon error, diminution, want of original, warrant of attorney, *&c.* is alledged, and a *certiorari* is ſued out, upon which a record is returned contrary to what is before returned, it cannot be received. *Vide* the caſe of *Tyſoun* v. *Hylyard.* 2 *Ld. Raym.* 1122.

If error be aſſigned in the *original*, and upon a *certiorari* granted an erroneous original is returned; and upon this, *in nullo eſt erratum* is pleaded; and after the court, *ad informandam conſcientiam*, grant another *certiorari* for another original; and upon this a good original is certified; the court ought to intend that this is the original upon which the judgment was given, in favour of judgments, which ought to be intended to be good. *Cro. Car.* 91. *Style*, 176. 2 *Rol. Rep.* 362. *Godb.* 407. *Rol. Ab.* 765.

An original writ of the term wherein final judgment is given, will not warrant that judgment, if it appear upon the ſame record, that there have been proceedings of a preceding term.—But the plaintiff below ought to have an original writ of the term the *placita* is of. *Dyke* v. *Sweeting.* 1 *Wilſ.* 181.

If a *certiorari* be prayed to certify an *original*, or a *warrant* of attorney of a wrong term, and the *chief juſtice*, or the *cuſtos brevium* return, that there is no *original* or *warrant* of that term, the defendant in error may make a ſuggeſtion of the right term, and pray a *certiorari*; which, when returned and filed, he may join *in nullo eſt erratum*, and enter it on the roll, paying the plaintiff's attorney 2*s.* 4*d.* for it.

Want of *original* was aſſigned, *certiorari* prayed, and return no *original*; afterwards the defendant applied to *chancery*; and upon

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upon affidavit, that inſtructions were given to the *curſitor* for an original, but they were loſt, the court of *chancery* allowed, that the original ſhould be ſupplied. Upon which the defendant in error prayed another *certiorari*, and an *original* was certified of the ſame term in which the default of an *original* was certified before; on which it was moved, that this was irregular; for, before the ſecond *certiorari* was returned, the defendant ought to have given a copy of the original to the plaintiff's attorney; but the *maſter* informing the court, that the courſe was ſo when the ſecond original certified was of another term, but not when it was of the ſame term, the motion was diſallowed. *Com.* 118.

The plaintiff aſſigned for error want of an *original*, and the defendant thereupon did not give a rule; but, at his own proper charges, took out a *certiorari*, and procured a certificate of an original. *Sed per Cur.* This is ill, for the error is not completely aſſigned until the certificate is returned, by which it appears, that there was no original in the cauſe. *Com.* 115.

Diminution cannot be alledged upon a *writ of error* brought upon a judgment in any *inferior court*.—But it may, upon *error*, in *Wales* and counties palatine. *Sid.* 147. 364.

So it may upon *error* of a judgment before juſtices of *oyer* and *terminer*. *Sid.* 40.

But if on a *certiorari* upon a *writ of error* it be certified, that the judgment was *quod defend. ſit in miſericordia*, the defendant, in the writ of error, cannot alledge diminution: *ſſ.* that the record is *quod capiatur*, becauſe that is contrary to the record certified. *Rol. Abr.* 764.

In a writ of error in *B. R.* on a judgment in *C. B.* the want of warrant of attorney being aſſigned for error, the plaintiff prayed one *certiorari* to the chief juſtice, and another to the *cuſtos brevium*; both of whom returned *non inveni aliquod warrant*; and the defendant dying, the plaintiff, by journies accounts, brought a new writ of error againſt the ſon and heir of defendant; who appearing, alledged diminution, in that the warrant of attorney was not certified, and prayed another *certiorari* to the *cuſtos brevium*; and it was urged, that the return was not *quod non habetur*, *&c.* but *quod non inveni*, *&c.* ſo that if upon the ſecond a warrant ſhould be returned, it would not be repugnant: But it ſeemeed to *Wray*, ch. juſt. That it would be

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be hard to grant a new *certiorari* in this case; for though if any variance could be alledged, it would be otherwise, as was adjudged in the case of one *Lassells*, where it was certified there was no warrant, and because the original was *inter Lassells execut' testamenti, &c.* where he was not named executor in the first *certiorari*; and upon the matter a new *certiorari* was granted. *Leon.* 22. Vide *Cro. Jac.* 277. and *Bulstr.* 21.——Where to the first it was returned, there was no warrant of attorney in that term wherein the action was commenced, and a second *certiorari* was awarded *.

Error of a judgment from *C. P.* on a judgment by default, the error assigned was, that there was no warrant of attorney for the defendant (the now plaintiff), entered on the record below. It was objected, that a man shall not take advantage of his own neglect in not making proper entries. To which it was answered, that in judgment by default, the plaintiff is to make up the whole record, and therefore it is his own laches. But the court ordered the cause to stand over, till the court of *Common Pleas* could be moved to amend the record, and afterwards the *chief justice* of *C. P.* directed a proper warrant of attorney to be filed and entered, and thereupon a new *certiorari* issued, and the judgment was affirmed. *French* v. *Cornelys.* 1 *Blackf. Rep.* 453.

After *in nullo est erratum* pleaded, no diminution can be alledged, either by the plaintiff or defendant in error, without leave of the court.

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* ☞ When all the proceedings are in one and the same term, an original of that term will warrant the same, but not otherwise. 1 *Keb.* 327. *Booth* v. *Beard.* But an original of the term final judgment is given will not warrant that judgment, if it appear upon the same record, that there have been proceedings of a precedent term. *Duke* v. *Sweeting.* 1 *Wilf.* 181.

The case of *originals* differs from *warrants of attorney*; for it is sufficient if a *warrant of attorney* be filed at any time pending the suit, let it be which term it will. The stat. of *Hen.* 8. only requires a warrant of attorney to be filed in the cause: and the 4 *Ann.* requires it to be filed according to the course of the court; and that is, to have it filed any time pending the suit; but it is otherwise as to an *original writ*, for if there be proceedings in the action in a term *preceding the return thereof*, the original of a term after will not support them.

Error,

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Error, upon a *fine* in *C. B.* and error aſſigned in the proclamations, upon which a *certiorari* went to the *cuſtos brevium*, who certified, that two of the proclamations were made in one day; but it appearing in the *chirographer's* office, that the proclamations were duly made, and he being the principal officer as to them, and the *cuſtos brevium* having only an abſtract thereof: upon the prayer of defendant, a *new certiorari* was directed to the *chirographer*, who having certified the proclamations duly made, after examination of the clerks of *C. P.* by the juſtices of *B. R.* they awarded that the proclamations with the *cuſtos brevium* ſhould be amended, according to thoſe in the cuſtody of the *chirographer*. 3 *Leon.* 106.

Attorney and his wife ſued by *writ of privilege*, and had judgment by default, on which error was brought in *B. R.* and want of a *writ of privilege* aſſigned for error. A *certiorari* was taken out to make good the error, but was not returned. And the court were of opinion, that if this ſuit was by *writ of privilege*, it was ill; but they held that it does not ſufficiently appear to them, that it was by writ of privilege: for the recital in the declaration is not ſufficient for them to found a judgment upon; but the writ of privilege ought to have been brought before the court, by return to the *certiorari*, and therefore judgment was affirmed. *Drew & Ux.* v. *Roſe. Ld. Raym.* 1398.

Error of a judgment in *C. P.* after verdict in a ſuit againſt an attorney. General errors were aſſigned. And the plaintiff in error inſiſted that all actions in *C. P.* muſt be either by *original writ*, *original bill*, or *attachment of privilege*. But this action does not appear to have been by any of theſe ways, for which reaſon the proceedings were irregular, and therefore he prayed judgment. *Sed per Cur.* This being before us by writ of error, we cannot take notice whether there was any original bill or not, the defendant being ſued as attorney, it not being aſſigned for error that there was no original bill. But in order to have taken advantage of this, the plaintiff in error ſhould have aſſigned for error, that there was no bill, and took out a *certiorari*, and got it returned that there was none. Judgment affirmed. *Graddell and others* v. *Tyſon. Ld. Raym.* 1441.

In error, the *teſte* of a writ of *certiorari*, by miſtake, was made in the 13th year of our *Lord*, inſtead of our *reign*. On motion

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motion for leave to amend, it was doubted whether the court had power to amend ſuch a writ or not. In ſupport of the amendment, the ſtatutes 8 *Hen.* 6. and 14 *Edw.* 3. and the caſe of *Brooke and others* v. *Cooper*, *in Trin.* 6 *Geo.* 2. to ſhew that the teſte of a writ of enquiry, out of term, was amended; and an anonymous caſe, in 3 *Vent.* 171. and *Blackmor's caſe in 8th report*, were cited. For defendant it was inſiſted, that this was ſuch a writ as could not be amended; and 1 *Lev.* 2. was cited to ſhew, that no original writ can be amended; and that the *teſte* of a writ of error is not amendable was cited 5 *Geo. c.* 13. In reply, it was ſaid, that this is not an *original*, but a *judicial* writ, therefore amendable by all the ſtatutes. But while the court took time to conſider, the amendment, by conſent of the parties, was ordered on payment of coſts. *Maſters* v. *Buck. Barnes*, 12.

On error of a judgment in *aſſumpſit*, by *nil dicit* in *C. B.* and writ of enquiry executed, and final judgment, plaintiff in error aſſigned the general errors, and alſo that there was no writ of enquiry, or inquiſition taken, filed, and remaining upon record in *C. P.* and prayed a *certiorari* directed to the *cuſtos brevium*. To which he returned, that there was no writ of enquiry, *&c.* upon which defendant in error ſuggeſted, that there is a writ of enquiry in the cuſtody of the *cuſtos brevium* of the *Common Pleas*, of ſuch a term affiled, and prayed a *certiorari*. To which the *cuſtos brevium* returned, that upon ſearch he found the writ of enquiry, *&c.* and then defendant ſet out the writ of enquiry, *&c.* which warranted and agreed with the record. And thereupon pleaded *in nullo eſt erratum*. And for the plaintiff it was inſiſted that judgment ought to be reverſed, becauſe the *cuſtos brevium* could not return a fact upon the ſecond *certiorari* in every particular, contrary to his return upon the firſt. And the court cannot tell to which return to give credit. *Sed non allocatur*. For there being a poſitive return of a writ of enquiry, which warrants the record, we will take that to be true. And judgment was affirmed. *Shipman* v. *Lethieullier*. *Ld. Raym.* 1476.

The defendant in *error* may have a ſecond *certiorari*, but plaintiff in *error* cannot.

The plaintiff in error took out a *certiorari* of a wrong term, which did not verify his error; and now he moved for a ſecond *certiorari*, which was denied. The court ſaying, it may be granted

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granted to affirm, but not to reverſe a judgment. *Merryfield* v. *Berry*. *Stra.* 765.

Plaintiff brought a writ of error upon a judgment againſt him in *C. P.* by *nil dicit*; and aſſigned in *Trinity* term the want of an original, and the want of a warrant of attorney; and one *certiorari* was directed to the chief juſtice as to the warrant of attorney, and another *certiorari* to the *cuſtos brevium* as to the original, which bore teſte the 21ſt of *June* (which was before the errors were aſſigned), upon which the *cuſtos brevium* returned that there was no original, *&c.* The defendant pleaded *in nullo eſt erratum.* And judgment was affirmed *niſi*, becauſe the plaintiff in error ought to take out a *certiorari* to verify his error that there was no original; but this *certiorari* bearing teſte before the aſſignment of the errors, could not be a *certiorari* upon that aſſignment of errors. *Bowers* v. *Mann. Ld. Raym.* 1554. *Stra.* 819.

Of

Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of aſſigning Errors, Joinder, &c.

THE *aſſignment of errors* by the plaintiff ought to be in the ſame term in which the record is removed. *Lutw.* 354. *F. N. B.* 20 *g.*

Otherwiſe the defendant may *nonproſs* the writ of error after a *ſci. facias quare*, &c. and *alias* returned *nihil*, and a rule thereon given to aſſign errors, which *vide ante.*

The errors aſſigned muſt be ſigned by counſel, and muſt be aſſigned in term, and not in vacation. *Prac. Reg.* 203.

And muſt be aſſigned upon the record.

Of aſſigning errors, and of joinder in error, *vide ante* under title, "*Of proceeding in Error from inferior courts*, &c." Upon the joinder in error, either party may move for a *concilium*, and ſet the cauſe down with the clerk of the papers for argument.

After the *plaintiff* has aſſigned errors, he may have a *ſcire facias ad audiendum errores*—but ſuch writ is now ſeldom ſued out, as the *defendant* appears uſually *gratis*; or the *plaintiff* in error, after his aſſignment of errors, takes a rule out for the defendant to appear thereto, and ſerves a copy thereof on the defendant.

Two days at leaſt before the cauſe comes to be argued, paper-books muſt be delivered to the judges. 2 *Jac.* 2. Though that rule of court ſays *four days* before, yet the practice has been for a long time paſt to deliver the paper-books only *two days* before.

The *plaintiff* in error delivers paper-books to the *chief juſtice* and the *ſenior judge*—the *defendant* to the two *junior judges.*

The court will not hear arguments unleſs books be delivered to all the judges; therefore it behoves the attorney who expects the judgment of the court to be for his client, to deliver all the books, eſpecially as he will be allowed in his coſts for the copies he makes for the other ſide. *Mich.* 17 *Car.* 1.

The court has refuſed to hear any argument on the ſide of the party who hath neglected to deliver books, though he has been willing to pay the other ſide for them.

Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of the Judgment, &c.

IF a judgment be below for the plaintiff, and error is brought, and that judgment reverſed; yet, if the record will warrant it, the court ought to give a new judgment for the *plaintiff*. *Cro. Car.* 443. *Salk.* 401. *Hob.* 194.—But if the judgment be erroneous, and againſt the plaintiff, that ought to be reverſed, and no new judgment given for the plaintiff. *Ibid.*

If any erroneous judgment be given for the defendant, and that is reverſed, and the merits appear for the plaintiff, he ſhall have judgment—But if the merits be againſt the plaintiff, the defendant ſhall have a new judgment. So it is in the *Exchequer Chamber*, for they are to reform, as well as to affirm or reverſe it. *Ibid.*

But in *Salk.* 262. it is laid down, that where the *plaintiff* brings the writ of error, and the court reverſes the judgment below, they give a new judgment for the plaintiff; but otherwiſe if the defendant below brings the writ of error, for then they only reverſe it.—So in *Burr. Rep.* 4 *pt.* 2156. if error is brought by the *plaintiff* below, the court upon the reverſal of the judgment, may give ſuch judgment as the court below ſhou'd have given: but if error is brought by the *defendant* below, the court can only reverſe it.

And *per* Lord *Mansfield*, in *Cuming* v. *Sibley*, *Burr.* 4 *pt.* 2490. Where the *plaintiff* below brings a *writ of error*, we may not only reverſe what is wrong, but give judgment for what is right. Where the *defendant* below brings a writ of error, we only reverſe ſuch wrong part of the judgment as he complains of.

A judgment cannot be reverſed in part, and affirmed in part, unleſs part is by *common law*, and part by *ſtatute*. *Salk.* 24.—As where in *aſſumpſit* and two ſeveral counts laid, one on a promiſſory note, on which plaintiff had counted as on a bill of exchange upon the cuſtom of merchants. *Non aſſumpſit* was pleaded, entire damages given, and judgment accordingly. And on error brought in *B. R.* it was held, 1. That plaintiff could not declare on a promiſſory note, as on a bill of exchange, and as there could be no ſuch count or action, ſo there could be no ſuch damages. 2. That they could not reverſe the judgment in part, *viz.* as to one count, and affirm it as to the other, and denied the caſe of *Jacob* v. *Mill. Hob.* 6. And took the difference above, *viz.* where the judgment is partly by the common law, and partly by ſtatute, it may be reverſed in part; for that which was a judgment at common law, will remain a judgment, and be complete without the other.

Of proceeding in Error by a Plaintiff to reverſe his own Judgment.

IF a plaintiff having obtained judgment below, brings a *writ of error* to reverſe his own judgment [which is nothing ſtrange or unreaſonable where it is given for a leſs ſum than he has a right to demand], the common method of bringing a *ſcire facias quare executionem non* would be improper, ſo would his ſuing out a *ſcire facias ad audiendum errores.*—Therefore if ſuch plaintiff in error will not proceed after his writ of error brought, the court of *B. R.* may and ought to make a rule to oblige him to aſſign errors within a limited time; which rule the court will make upon the *plaintiff* in error, to aſſign errors within *four days*, or elſe that his *writ of error* ſhall be *nonproſſed*. *Johnſon* v. *Jebb. Burr. Rep.* 4 *p.* 1772.

Of

Of proceeding in Error from the KING'S BENCH into the EXCHEQUER CHAMBER.

AS no *writ of error* lay of a judgment in the *King's Bench* but in *parliament*, and as the ſubjects were often diſappointed of their writ of error by the not ſitting of parliament, or by their being employed in publick buſineſs when they did ſit:

By the 27 *Eliz. c.* 8 it was enacted, "That where any "judgment ſhall, at any time hereafter, be given in the ſaid "court of the *King's Bench*, in any ſuit or action of *debt*, *de-* "*tinue*, *covenant*, *account*, *action upon the caſe*, *ejectione firmæ or* "*treſpaſs*, firſt commenced there [other than ſuch only where "the queen's majeſty ſhall be party], the party plaintiff or de- "fendant, againſt whom any ſuch judgment ſhall be given, "*may*, *at his election*, ſue forth out of the court of *Chancery*, a "ſpecial writ of error to be deviſed in the ſaid court of *Chan-* "*cery*, directed to the chief juſtice of the ſaid court of the *King's* "*Bench* for the time being, commanding him to cauſe the ſaid "record, and all things concerning the ſaid judgment, to be "brought before the juſtices of the *Common Bench*, and the "barons of the *Exchequer* into the *Exchequer Chamber*, there "to be examined by the ſaid juſtices of the *Common Bench*, and "barons aforeſaid; which ſaid juſtices of the *Common Bench*, "and ſuch barons of the *Exchequer* as are of the degree of the "coif, or ſix of them at the leaſt, by virtue of this preſent act, "ſhall thereupon have full power and authority to examine "ſuch errors as ſhall be aſſigned or found in or upon any "ſuch judgment; and thereupon to reverſe or affirm the ſaid "judgment as the law ſhall require, other than for errors to be "aſſigned or found for or concerning the juriſdiction of the "ſaid court of *King's Bench*, or for any want of form in any "writ, return, plaint, bill, declaration, or other pleadings, "proceſs, verdict, or proceeding whatſoever; and that after "the ſaid judgment ſhall be affirmed or reverſed, the ſaid re- "cord, and all things concerning the ſame, ſhall be removed, "and brought back into the ſaid court of the *King's Bench*, "that ſuch further proceeding may be thereupon had, as well "for execution as otherwiſe, as ſhall appertain."

This ſtatute only gives the party his option in ſuch caſes, of ringing his error in Parliament or the *Exchequer*.

The *Exchequer Chamber*, under this ſtatute, hath nothing to o with errors in *fact*. 2 *Lev.* 38. 1 *Vent.* 207. 2 *Mod.* 194.

The *writ of error* can only be returnable in the *Exchequer hamber* in the *ſeven* caſes mentioned in this act, where the ſuit as *firſt commenced* in *B. R.* Therefore if a ſuit is by *original* in . *R.* a writ of error on a judgment thereon muſt be returnable Parliament, and cannot be in the *Exchequer Chamber*, becauſe

Of proceeding in Error from the King's Bench into the Exchequer Chamber.

ſuch ſuit is not commenced there, but in *Chancery*, where the *original writ* is purchaſed.

A *writ of error* therefore can only be returnable on judgments in *B. R.* in actions of *debt*, *detinue*, *covenant*, *account*, *action on the caſe*, *ejectment*, *and treſpaſs*, firſt commenced in *B. R.* which muſt be by *bill*.

But if a plaintiff in *B. R.* be nonſuited, and there is a judgment againſt him for coſts, error lies in *Cam. Scacc.* *Stra.* 235.

Though the words "*action on the caſe*" are general, and ſeem to comprehend every action on the caſe, yet it hath been held, that this ſtatute does not extend to the action of *ſcandalum magnatum*, although that is an action upon the caſe: ſo that *error* thereon does not lie in *Cam. Scacc.* by force of this ſtatute of *Elizabeth*. For the ſtatute of *ſcand. mag.* 2 *Rich.* 2. *c.* 5. was made for the preſervation of the publick peace; and beſides, an action thereon is of an higher nature than an action upon the caſe, being founded ſpecially on a ſtatute. *Vide Cro. El.* 142. *Ld. Raym.* 954.

This *writ of error* is obtained of the *curſitor* in like manner as all other writs of error are;—and by *Reg. Eaſt.* 36 *Car.* 2. Every attorney who ſhall ſue out any writ of error on any judgment of this court returnable in the *Exchequer Chamber*, ſhall forthwith allow ſuch writ of error with the *clerk of the errors* of this court for the time being, and no execution ſhall be ſtayed until ſuch allowance.

And where ſpecial bail is required, if the plaintiff upon ſuch writ of error does not *within four days* after the allowance thereof put in *ſpecial bail*, the plaintiff in the action may proceed to take out execution, notwithſtanding ſuch writ of error. Same rule.

If ſpecial bail is put in, the *plaintiff* in error, or his attorney, muſt forthwith give notice thereof to the *defendant* in error, or his attorney; and if the *defendant* in error does not except againſt ſuch bail *within twenty days* after ſuch notice, ſuch bail ſhall be allowed. *Mich.* 5 *W. & M.*

The record itſelf is not tranſmitted from the *King's Bench* into the *Exchequer Chamber*, as it is from the *Common Pleas* into the *King's Bench* in caſes of error, but only a *tranſcript* thereof; and all the rules, until the making up and delivering over the tranſcript, are given by the *clerk of the errors* [Mr. *Way*]: But after delivery of the tranſcript, all rules, *&c.* are given by the *clerk of the errors* of the *Exchequer Chamber*.

When the *plaintiff* has aſſigned his errors in the *Exchequer Chamber*, that court does not award a *ſcire facias ad audien-*

dum

Of proceeding in Error from the KING's BENCH into the EXCHEQUER CHAMBER.

dum errores, but notice is given to the parties concerned. 1 *Vent.* 34. Vide *Palm.* 186.

If the *plaintiff* in error, after errors aſſigned in the *Exchequer Chamber*, intends to argue the ſame, he muſt give ten days notice to the *clerk of the errors* there, before they ſhall be argued; and copies of the paper-book in error muſt be made and delivered by the parties—The *plaintiff in error* delivers books to the judges of the *Common Pleas*, and the *defendant* to the barons of the *Exchequer*. *Eaſt.* 33 *Car.* 2.

On judgment in error in the *Exchequer Chamber*, a *remittitur* of the tranſcript to the *King's Bench* is entered, and the execution thereon iſſues out of *B. R.*

Upon a ſpecial verdict, the judgment was in *B. R.* for the defendant, which judgment was reverſed in the *Exchequer Chamber*. Beſides the reverſal, that court gives a complete judgment for the plaintiff, *viz. that he do recover*. *Carth.* 319. *Ld. Raym.* 10.

Judgment for defendant on demurrer was reverſed in the *Exchequer Chamber*; and judgment *that the plaintiff do recover, was given*, &c. But becauſe that court had not power to award a writ of enquiry, it was ſent into *B. R.* for the execution of that writ, and thereupon to give final judgment. *Vide Carth.* 319. *Ld. Raym.* 10. And authorities there cited.

If error is brought by many in the *Exchequer Chamber*, and ſome die, a *remittitur* ſhould be entered to warrant execution in *B. R.* againſt the ſurvivors. *Carth.* 236.

If a writ of error abates in *Cam. Scacc.* or is diſcontinued, there muſt be a *remittitur* entered in *B. R.* for without ſuch *remittitur* it cannot appear to the court of *King's Bench*, but that the writ of error is ſtill depending in the *Exchequer Chamber*. But if it appears that a *remittitur* was entered, the court will not examine into the time of the entry. *Carth.* 237.

On a writ of error into the *Exchequer Chamber*, a *ſcire facias ad audiend. errores* was awarded, returnable on the 11*th* of *May*; and there being no ſuch day of adjournment in *Cam. Scacc.* it was held to be a diſcontinuance; and that a writ of error *quod coram vobis* lies not in *Cam. Scacc.* which has its power by ſtatute, and can only reverſe or affirm the judgments of *B. R.* and remand to the *King's Bench* for execution; and when the plaintiff in error there is nonſuited, or the writ is diſcontinued, they have no more to do with it, for they have no record before them, but it remains in the *King's Bench*. And though ſeveral precedents were produced where *writs of error coram vobis*, &c.

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were allowed, yet, as thoſe paſſed without debate, no regard was paid to them. *Cro. Jac.* 620.

Error of a judgment in *B. R.* into *Cam Scacc.* infancy aſſigned, and appearance *by attorney below*, defendant in error pleaded *in nullo eſt erratum*, and prayed the judgment to be affirmed. On argument, all the juſtices and barons agreed, that error in *fact* could not be aſſigned, nor was it examinable in the *Exchequer Chamber*; and that *in nullo eſt erratum* was in the nature of a demurrer to it, and that judgment ought to be affirmed; upon which it was moved, that the plaintiff in error might diſcontinue his writ, upon payment of coſts, which was granted *niſi*, and afterwards made abſolute: But afterwards, upon affidavit that the coſts were taxed, and had been demanded, and that the plaintiff in error refuſed to pay them, the rule for diſcontinuing the writ of error was diſcharged. The cauſe was again put into the paper, and the judgment affirmed. *Roe* v. Sir *John Moore*, Bart. *Com. Rep.* 597.

In treſpaſs 300*l.* damages were recovered, and error was brought on the judgment in *Cam. Scacc.* pending which, plaintiff brought an action of debt on the judgment; and by all the judges, except *Keelynge*, it well lies, for the record itſelf is yet in the court, and the writ of error is a *ſuperſedeas* only. 1 *Lev.* 153.

A judgment in *C. P.* was affirmed upon a writ of error in *B. R.* and a *ſcire facias* was brought on that judgment, and plaintiff obtained judgment. And it was held, that no writ of error lies thereon in the *Exchequer Chamber*, becauſe the record was not in *B. R. by bill*, as the ſtatute requires, but by of error. 3 *Salk.* 148.

Plaintiff had judgment in an action on the caſe in *B. R.* defendant brought error thereon in the *Exchequer Chamber*, and plaintiff *non proſſed* defendant's writ of error. Defendant then tendered plaintiff the debt and coſts in the original action, who refuſed the ſame, unleſs the defendant would pay *intereſt* and coſts; and ſued out a *latitat* on the judgment. Defendant then moved *B. R.* to ſtay proceedings. *Per Cur.* Plaintiff is entitled to *intereſt* occaſioned by the delay, but *no coſts*. *Roberts* v. *Birch*. *Mich.* 26 *Geo.* 3. *Sed vide Dougl.* 721. *aliter.*

Of

Of proceeding in Error returnable in PARLIAMENT.

THE court of parliament is the ſupreme court where anciently cauſes of great conſequence, as between the *magnates regni*, were heard and determined. Hence the lords is the *dernier* reſort to which a writ of error lies; and therefore, if a writ of error be brought of a judgment in the *King's Bench*, into the *Exchequer Chamber*, and there the judgment is reverſed, yet a writ of error lies of ſuch judgment into parliament, and the lords may reverſe ſuch ſecond judgment.

So, a writ of error lies into parliament upon a judgment given in *B. R.* upon a ſuit originally commenced there, even in thoſe actions mentioned in the ſtat. 27 *Eliz. c.* 8. for that ſtatute only gives the party an election in thoſe actions to have the writ of error returnable in the *Exchequer Chamber*.

If the ſuit is by *original* in *B. R.* in all caſes, a writ of error is returnable in parliament; for the ſtatute of *Eliz.* only gives the party an option to proſecute error in the *Exchequer Chamber* in the *ſeven actions* therein ſpecified, if ſuch actions were originally commenced in *B. R.*

The writ of error is obtained of the *curſitor*, as in other caſes, and is made returnable, if the parliament is ſitting, *immediately*; or, if the parliament is prorogued, then *ad proximum parliamentum*.

If error is brought on a judgment in *B. R.* the *chief juſtice* conveys the *roll*, with the *tranſcript*, to the *Houſe of Lords*, and leaving the *tranſcript* there, takes back the *roll*. 4 *Inſt.* 21. *Dy.* 375. *a.* 1 *Rol.* 753. *l.* 20. *Cro. Jac.* 341. *Godb.* 247.

Error does not lie from the court of *Exchequer* into the *Houſe of Lords* immediately, for the *Exchequer Chamber* interpoſes. *Salk.* 511. 4 *Inſt.* 21. 31 *Edw.* 3.

When the *tranſcript* is brought in, a peer moves the houſe for a day to be given the plaintiff to aſſign his errors, which is accordingly ordered, and of which the plaintiff muſt take notice; otherwiſe, the tranſcript will be remitted. Upon the aſſignment of errors, the *defendant* joins iſſue *in nullo eſt erratum*, and thereupon another motion is made by a peer for their lordſhips to appoint a day for hearing the errors. On the day appointed, both parties attend with their counſel; but no more than two counſel will be heard on each ſide.

To regulate the proceedings in *error* returnable in parliament, the lords have made ſeveral orders; and firſt, by *Ordo Dom. Proc. die Ven.* 13 *Dec.* 1661.

Foraſmuch as upon writs of error returnable in this high court of parliament, the parties therein often deſire to delay

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juſtice, rather than to come to the determination of the right of the cauſe; "It is therefore ordered, by the lords ſpiritual and temporal, in parliament aſſembled, that the plaintiffs, in all ſuch writs, after the ſame and the records be brought in, ſhall ſpeedily repair to the clerk of the parliament, and proſecute the writs of error, and ſatisfy the officers of this houſe their fees juſtly due unto them, by reaſon of their proſecution of the ſaid writs of error, and the proceedings thereupon; and further, ſhall aſſign their errors *within eight days after the bringing in of ſuch writs with the records*; and if the plaintiff makes default ſo to do, then the ſaid clerk, if the defendant in ſuch writs require it, ſhall record, that the plaintiff hath not proſecuted his writ of error; and that the houſe do therefore award that ſuch plaintiff ſhall loſe his writ, and that the defendant ſhall go without day, and that the record be remitted; and if any plaintiff, in any writ of error, ſhall alledge diminution, and pray a *certiorari*, the clerk ſhall enter an award thereof accordingly, and the plaintiff may, before *in nullo eſt erratum* pleaded, ſue forth the writ of *certiorari* in ordinary courſe, without ſpecial petition or motion to this houſe for the ſame; and if he ſhall not proſecute ſuch writ, and procure it to be returned *within ten days after his plea of diminution put into this houſe*, then, unleſs he ſhall ſhew ſome good cauſe to this houſe for the enlarging of the time for the return of ſuch writ, he ſhall loſe the benefit of the ſame, and the defendant in the writ of error may proceed as if no ſuch writ of *certiorari* were awarded."

And by *Ordo Dom. Procer. die Martis*, 19 *Aprilis* 1698.

The houſe taking notice, that upon appeals and writs of error, there have been of late ſeveral ſcandalous and frivolous printed caſes delivered to the lords of this houſe; for preventing whereof for the future, it is this day ordered, by the lords ſpiritual and temporal, in parliament aſſembled, that no perſon whatſoever do preſume to deliver any printed caſe or caſes to any lord of this houſe, unleſs ſuch caſe or caſes ſhall be ſigned by one or more of the counſel who attended at the hearing of the cauſe in the courts below, or ſhall be of counſel at the hearing in this houſe: and this order to be added to the roll of ſtanding orders, and affixed on the doors of this houſe, and the courts in *Weſtminſter*.

And by *Ordo Dom. Procer. die Mercur.* 22 *Dec.* 1703.

Upon conſideration of the great inconveniencies ariſing by motions and petitions for putting off cauſes after days have been appointed

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appointed for hearing thereof; It is ordered, by the lords ſpiritual and temporal, in parliament aſſembled, that when a day ſhall be appointed for the hearing any cauſe, appeal, or writ of error, argued in this houſe, the ſame ſhall not be altered, but upon petition; and that no petition ſhall in ſuch caſe be received, unleſs *two days notice thereof be given to the adverſe party*, of which notice oath ſhall be made at the bar of this houſe; and it is further ordered, that this order be added to the roll of ſtanding orders.

And by *Ordo Dom. Procer. die Veneris*, 21 *Feb.* 1717.

Ordered, that in all caſes upon writs of error depending in this houſe, when diminution ſhall be at any time alledged, and a *certiorari* prayed and awarded before *in nullo eſt erratum* pleaded, the clerk of the parliaments ſhall, upon requeſt to him made, give a certificate that diminution is ſo alledged, and a *certiorari* prayed and awarded thereupon. And it is further ordered, that this order be entered on the roll of the ſtanding orders of this houſe.

And by *Ordo Dom. Procer. die Sabbatis*, 2 *Mart.* 1727.

Upon report from the committee of the whole houſe, appointed to take into conſideration matters relating to the proceedings on appeals, and writs of error; It is ordered, by the lords ſpiritual and temporal, in parliament aſſembled, that at the hearing of cauſes for the future, one of the counſel for the appellant ſhall open the cauſe, then the evidence on their ſide ſhall be read, which done, the other counſel for the appellants may make obſervations on the evidence; then one of the counſel for the reſpondents ſhall be heard, and the evidence on their ſide to be read, after which the other counſel for the reſpondents ſhall be heard, and one counſel only for the appellants to reply.

If the parliament is diſſolved, the writ of error is abated.

A writ of error returnable in parliament, was diſcontinued by the prorogation; another writ was brought *teſted* the laſt day of the ſeſſion, *viz.* 1 *March*, *returnable* 19 *Nov.* the day to which it was prorogued. The court reſolved, that though the firſt writ was not diſcontinued by any act of the party, yet the ſecond writ ſhould be no *ſuperſedeas*. Vide 1 *Vent.* 31.

A writ of error teſted 30 *Nov.* returnable in parliament the 30*th of April* next, the day to which parliament was prorogued. *Per Hale*, The lords have lately declared, that prorogation does not determine a cauſe depending in parliament by writ of

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error; but that comes not to this caſe, the writ not being returned. A writ of error returnable *at the next parliament* is not good; but otherwiſe if they are ſummoned or prorogued to a day certain. A writ of error bore teſte 10 *Nov.* and returnable 1 *Nov. next following*, and the record was ſent into the *Exchequer Chamber*, and a *mittimus* indorſed upon the roll here; and it was reſolved, that execution might be taken out, becauſe of the long return. 2*dly*, That though there were a *mittimus* upon the roll, yet the record remained here until the return of the writ to all purpoſes.—In the opinion of the court, the writ of error was no *ſuperſedeas*; but they would make no rule, becauſe not judicially before them; but that the party might take out execution if he thought fit; and then if the other ſide moved for a *ſuperſedeas*, they would reſolve the point. 1 *Vent.* 266. 2 *Lev.* 120.

If a *writ of error* be brought in the *Exchequer Chamber*, and that being diſcontinued, another is brought in parliament, this ſecond writ is a *ſuperſedeas*. But if a writ of error be brought in parliament, and that abates, and the plaintiff brings a ſecond, this is no *ſuperſedeas*, becauſe it is in the ſame court. 1 *Vent.* 100.

A writ of error does not determine by the prorogation of the parliament. 2 *Lev.* 93.

Error of a judgment in *B. R.* for defendant, into *dom. Proc.* and the judgment was reverſed, and the record was remitted into *B. R.* whereupon the plaintiff moved *B. R.* for a new judgment. *Per Cur.* A new judgment cannot be given here contrary to that which is already given; the ſame court which reverſed muſt give a new judgment. *Philips and Bury. Carth.* 319. *Ld. Raym.* 9, 10.

If judgment below was given for the defendant, upon *demurrer*, and the judgment be reverſed, whereupon a *writ of enquiry* becomes neceſſary in ſuch caſe, as the lords cannot award a *writ of enquiry*, the record is remitted to *B. R.* for them to award the writ of enquiry, and upon return thereof, then to give final judgment. *Vide ibid.*

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'TIS beneath the dignity of the Houſe of Peers (that being the ſupreme judicature) to try matters of *fact*, and for that reaſon errors in *fact* of any judgments in the *King's Bench* muſt be redreſſed there, and not in parliament. *Knoll's caſe.* 3 *Salk.* 146.

But upon a judgment in *criminal* caſes in *B. R.* error will lie in the ſame court, whether the error be in *fact*, or in *law*; but it lies alſo in parliament. 3 *Salk.* 147.

So that if a judgment in *B. R.* be erroneous in matter of *fact* only, and not in point of *law*, a *writ of error coram nobis reſident'* may be brought in *B. R.* where the judgment was given, to reverſe that judgment; for error in *fact* is not the error of the judges, and reverſing it is not reverſing their own judgment.

This writ of error is allowed in court by the *ſecondary*, or it may be allowed in vacation by the *ſecondary*—And it is ſaid to be no *ſuperſedeas* of execution without leave of the court. *Carth.* 368.

The ſtatutes requiring *bail* in error do not extend to this writ of error.

When the *writ* is allowed, and notice thereof given, the defendant in error ſhould move for a rule to compel the plaintiff to aſſign errors; upon ſervice of which he muſt immediately aſſign errors. Upon the aſſignment of error *in fact*, if the error *in fact* is aſſignable and well aſſigned, the defendant may confeſs it. *Salk.* 268.—But a defendant can never confeſs error in *law*.

But if the *error* in fact is not well aſſigned, the defendant may plead thereto, upon which the parties are at iſſue in *fact*; and that muſt be tried by a jury. The record for trial is then made up the ſame as in other caſes, and either party may carry it down; and in ſuch caſe, if the iſſue is found for the *plaintiff in error*, he muſt move to put the cauſe in the paper for argument, and then upon producing the *poſtea* the court will give judgment of reverſal.

But if the error in *fact* aſſigned, is not aſſignable for error, then the defendant may join *in nullo eſt erratum*, which is in nature of a *demurrer*, and the ſame is argued in court as in other caſes.

Where matter of fact is inſufficiently alledged, *in nullo eſt erratum* is a demurrer.—So it is if matter of fact is alledged againſt the record. But if matter of fact is well ſet forth with matter of law, it is a *demurrer* as to the doubleneſs, but that muſt be ſpecially aſſigned; or otherwiſe, upon *in nullo eſt erratum* pleaded,

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pleaded, the matter of fact will be confeſſed, and the matter of law referred to the judgment of the court.

Error *coram vobis*, and infancy aſſigned, a *ſcire facias ad audiendum errores*, and *ſcire feci* returned; but defendant did not appear and join in error; on which plaintiff applied to know what to do. The court directed him to put it in the paper, without taking out any rule to join in error; and when it came on, the judgment was reverſed. *Thatcher* v. *Stephenſon. Stra.* 144.

Error in *C. B.* infancy aſſigned. *Doubt del court*, and feigned iſſue, which was found for plaintiff in error, and the judgment was reverſed on return of the *poſtea*, upon motion, without argument in the paper, but within a day or two after. *Oſborn* v. *Barrington. Stra.* 127.

In *F. N. B.* 21. it is ſaid, that a judgment cannot the ſame term it is given be reverſed in *B. R.* without a *writ of error*, though a judgment in the *Common Pleas* may: but there ſeems no foundation for this diſtinction. *Moor*, 186. *pl.* 332. *Yelv.* 157. *Pop.* 181. For during the whole term in which any judicial act is done, the record remains in the breaſt of the judges of the court; and therefore the roll is alterable during the term, as they ſhall direct. But when the term is paſt, the roll is the record, and admits of no alteration. *Co. Lit.* 260. *a.*

When a record is removed upon error brought from *C. B.* or other inferior court, into *B. R.* and the ſame writ of error is quaſhed for any other fault than *variance*, error *coram vobis* lies in the ſame court to which the record is removed. *Co. Ent.* 289. 1 *Stra.* 607. and in ſuch caſe ſuch writ of error is the only writ that can be had. *Ibid. Ld. Raym.* 1403.

When errors are aſſigned, and afterwards that writ of error is diſcontinued, the *plaintiff* in error may have another writ *quod coram vobis reſidend*, and upon this new writ may aſſign other errors than thoſe he aſſigned before, either within or without the record, and is not bound to the ſame errors.

This writ of error *coram vobis* recites the former writ of error, and muſt recite it accurately; for where ſuch writ recited the former writ to be returnable *coram nobis*, where it was before the king, and the late queen, it was quaſhed *. *Ld. Raym.* 151. *Carth.* 370. *Sed vide* of *Amending Writs of Error*, poſt.

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* But the writ was quaſhed for another reaſon, *viz.* that the writ of error was brought to *defeat* a judgment, and therefore it ſhould not have a favourable conſtruction; although in the ſame caſe it was

inſiſted,

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This writ of error muſt be entered upon the ſame roll with the firſt, that the court may ſee all together. *Cro. El.* 155. 281.

If a *writ of error quod coram vobis* is brought after *abatement or diſcontinuance* of a writ of error *quod coram nobis*, no bail is requiſite, becauſe none was required in the writ of error *coram nobis*.

But if *error coram vobis* is brought upon *diſcontinuance, &c.* of a writ of error upon a judgment of *C. B.* or other inferior court, it ſeems new bail is requiſite. Vide *Carth.* 369. and *Ld. Raym.* 151.

If a writ of error once good, abates by plea or death, the inferior court cannot proceed; but the ſuperior court and party may have a new writ *quod coram vobis reſidet*; but where the writ is ill, no new writ *coram vobis* can be had; as where the writ was to remove a judgment *quod fuit in curia noſtra*, where it was in the time of a *predeceſſor*. *Latch.* 198.

Error *coram vobis* lies not after an affirmance of a judgment, except in caſe of error upon a *fine* in *C. B.* after affirmance thereof in *B. R. Salk.* 337. although in this caſe of a *fine* †, the tranſcript is only tranſmitted into *B. R.* upon error brought.

Error *coram vobis* does not lie in *B. R.* after error brought in *Cam. Scacc.* and judgment affirmed. Becauſe, before the ſtat. of *El. B. R.* could not examine its own errors in *fact*, after an affirmance in parliament; and the *Exchequer Chamber* is now in the ſame degree with regard to *B. R.* in thoſe caſes within the ſtatute, as the parliament was before, and is now. Vide *Stra.* 690.

Error *coram vobis* lies not in the *Exchequer Chamber*.

On a judgment on *ſcire facias* in *B. R.* againſt bail, they brought error *coram nobis reſident'*, and for error aſſigned matter of fact, contrary to the ſuggeſtion of the *ſci. fa's*; upon which iſſue being taken, and found for the plaintiff in error, ſhe moved that the judgment might be reverſed. *Per Holt*, A writ of error will not lie in this caſe, but an *audita querela* only; becauſe the fact aſſigned for error is in the ſuggeſtion of the writ

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inſiſted, that according to a grammatical conſtruction, the relatives and verb being in the *plural* number, the clauſe would extend to the queen as well as the king.

† If on error brought into *B. R.* of a *fine* in *C. B.* and the ſame is reverſed, a *certiorari* goes for the foot of the *fine*, and it is cancelled in *B. R.* If it is affirmed, the tranſcript is remitted into *C. B.* becauſe *B. R.* has no *chirographer*.

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itſelf, and not in any of the proceedings in the cauſe. Therefore adjudged that error did not lie, wherefore plaintiff brought *audita querela*. *Lampton* v. *Collingwood*. *Carth*. 282. It was aſſigned for error in the above writ, that there was no *capias*, but only a *ſci. fa.* againſt the principal. And it was diſallowed, for this is an error in *fact*, but no error in the *court*. 3 *Salk*. 145.

Writ of error in the *Exchequer Chamber*, upon a judgment in *B. R.* and error in *fact* aſſigned; which not being aſſignable there, that court affirmed the judgment, and the record of affirmation being tranſmitted into *B. R.* the plaintiff brought another writ of error there *coram vobis reſidend'*, and moved, that upon putting in bail, it might be a *ſuperſedeas* to the execution. But the court would not allow it; becauſe the judgment being affirmed in the *Exchequer Chamber*, *tranſit in rem judicatam*. 1 *Vent*. 107. 2 *Lev*. 38. 3 *Salk*. 333.

Of proceeding in Error TAM QUAM.

A Writ of error *tam in redditione judicii quam in adjudicatione executionis*, is a writ of error brought by *bail* (after *ſcire facias* againſt them, and award of execution thereon) of the judgment againſt them, and the execution awarded thereupon; for they cannot have error of the *principal judgment*. Vide *Cro. Car.* 481. 2 *Leon.* 101. *Cro. Car.* 561.

Nor can the bail join with the principal in error. *Palm.* 567.

This writ of error recites the judgment againſt the principal, but alledges the error in the ſecond judgment, and in the execution thereof to the damage of the bail.

For error in *fact* the bail are relievable by *audita querela*. *Yelv.* 155.

Bail brought a writ of error *tam in redditione judicii* in the original action, *quam in adjudicatione executionis*. And it was quaſhed, becauſe bail cannot have error on the principal judgment. *Carth.* 447.

After an award of execution againſt bail, on a recognizance in error, they brought a writ of error, as to ſuch award of execution: the plaintiff moved for leave to take out execution for want of bail on the writ of error brought by the bail, and obtained a rule to ſhew cauſe; which was afterwards diſcharged, no bail in this caſe being required. *Barnet*, 194.

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A *Writ of error* was not amendable at *common law*, nor by any of the ſtatutes of amendments and jeofails, till the 5 *Geo.* 1. *c.* 13. for all amendments are granted for the ſupport of judgments; but the principal deſign of writs of error is to reverſe them. *Ld. Raym.* 71.

But by the ſtat. 5 *Geo.* 1. *c.* 13. it is enacted, "That all "writs of error, wherein there ſhall be any variance from the "original record or other defect, may and ſhall be amended, "and made agreeable to ſuch record, by the reſpective courts "where ſuch writ or writs of error ſhall be made returnable, "*&c.*"

No coſts are to be paid on any amendment of writs of error, purſuant to this ſtatute; but if the writ of error be quaſhed, the defendant in error ſhall have *coſts*. *Fitzgib.* 201.

If a writ of error is amended in *B. R.* new bail ſhall be given to the amended writ in *C. B.* and the plaintiff below ſhall not take out execution for want of bail. 2 *Blackſ. Rep.* 1067.

Error of a judgment in *C. B.* in an action there by a *feme* ſole. To the *ſcire facias quare executio. non*, the plaintiff in error pleaded in abatement, that the defendant in error was married ſince the judgment, and before the iſſuing of the *ſcire facias*; on which defendants in *error* moved to quaſh their own *ſci. fa.* and the other ſide inſiſted upon coſts. *Per Cur.* It is the ſame in a *ſcire facias* as in an action, where you plead in abatement, and plaintiff's writ is abated, he pays no coſts. Had there been no plea in abatement, and the party had moved to quaſh his own writ, we ſhould have made him pay coſts. The writ was quaſhed without coſts. *Pocklington* v. *Peck.* *Stra.* 638.

A writ of error was returnable before any judgment given, and on conſideration, it was held to be ſuch a fault as is not amendable by the 5 *Geo.* 1. *Stra.* 807.

There was a variance between the writ of error and the record; and as it ſtood in the paper the court obſerved it; but neither party would move to amend it, for fear of paying coſts. Upon which the court ſaid the ſtat. 5 *Geo.* 1. *c.* 13. would warrant their amending it, which they did without coſts. *Gardner* v. *Merratt.* 902. *Ld. Raym.* 1587.

Error was brought by *B.* to reverſe a judgment given againſt him in *C. P.* after verdict in ejectment, wherein he was defendant.

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ſendant. The writ was *teſted* 23 *of Oct.* and returnable *in eight days of St. Martin* in *Mich.* following. And by the record certified, the judgment appeared not to be given till *Hilary* following. Whereupon it was clearly held, that the record was not removed by this writ of error. Then it was moved, that the writ of error might be amended by the 5 *Geo.* I. *c.* 13. but upon reading the ſtatute, the court were of opinion it could not be done; for it would be to amend the writ, contrary to the truth of the caſe, as the judgment, in fact, was not given till *Hilary term*; and therefore, this was not ſuch a *variance* as was intended to be amended by that act. *Ld. Raym.* 1531. *Stra.* 807.

A writ of error cannot be quaſhed till the tranſcript is returned and filed. *Ld. Raym.* 329.

A writ of error was quaſhed becauſe all the proper parties were not plaintiffs. *Ld. Raym.* 71.

A writ of error on a judgment in *B. R.* returnable in the *Exchequer Chamber*—cannot be quaſhed in *B. R. Dougl.* 336.

A writ of error *tam quam* may be quaſhed as to one judgment, and ſtand good as to another, if it ſhould be brought for error in the principal judgment, as well as for error *in adjudicatione executionis*, which is wrong. *Ld. Raym.* 328.

Judgment was againſt *A.* and *B.* executors; a *ſcire fieri* enquiry was awarded, to which a *devaſtavit* againſt *A.* was returned; and upon that *devaſtavit* judgment was given againſt *A.* upon which judgment, *A.* ſued a writ of error without naming his co-executor to reverſe the *principal* judgment, and alſo the judgment upon the *devaſtavit* againſt himſelf; and becauſe he alone could not ſue error upon the principal judgment, the writ of error was quaſhed as to that, and ſtood good as to the other part. *Ibid.*

A writ of error of a judgment on a recognizance was quaſhed, becauſe it was in *adjudicatione executionis judicii*. *Ld. Raym.* 553. for it ought to have been *in adjudicatione executionis ſuper recognitionem.*

So quaſhed for variance in the ſtile of the court. *Ld. Raym.* 704.

If one brings error without the other, who ought to join with him, though the writ ſhall be quaſhed, yet the record ſhall be removed by it. *Ld. Raym.* 1403. Such writ cannot be amended;

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amended; *Ld. Raym.* 1532. and in this caſe ſaid, that the record is not removed by ſuch bad writ of error.

Coſts upon quaſhing writs of error are to be given in all caſes. *Stra.* 606.

The court will not quaſh a writ of error on motion, though it appears to be brought *twenty-nine years* after the judgment, and the ſtatute reſtrains the party to *twenty years*; becauſe if they did, it would deprive the plaintiff in error of the benefit of replying to the exceptions in the ſtatute. *Higgs* v. *Evans.* *Stra.* 837.

Several judgments were againſt three executors, two of whom only joined in bringing error, and bad. 1 *Wilſ.* 88.

No perſon can bring error to reverſe a judgment, who was not a party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reverſal. *Rol. Abr.* 747. *Dy.* 90.

So error does not lie againſt any but him who was party or privy to the firſt judgment, his heirs, executors, or adminiſtrators. *Rol. Abr.* 747. 9 *Hen.* 6. 46, *&c.*

If a writ of error abates by the act of the party, execution ſhall go. *Stra.* 1015. as where a writ of error brought by a *feme ſole* abated by her marriage; and then ſhe and her huſband brought a ſecond writ; the court gave leave to take out execution, it being a delay by the act of the plaintiff in error.

If there are ſeveral plaintiffs in one writ of error, the death of one abates the writ of error, becauſe there cannot be any judgment according to the writ; but if there are ſeveral defendants in error, and one dies, it is otherwiſe, for they are not named in the writ. *Ld. Raym.* 244.

A writ of error does not abate by the death of the defendant in error. *Ld. Raym.* 439. *Salk.* 246. but otherwiſe if the plaintiff die. Sir *H. Thynne* v. *Corie.* 1 *Vent.* 34. A *ſcire facias ad aud. errores* went againſt the executor, when the defendant in error died. Vide *Barnes*, 432.

If the plaintiff in error dies before errors aſſigned, the writ abates, and the defendant in error may ſue out a *ſcire facias* to revive the judgment againſt his executor, *&c.* But if he die after errors aſſigned, and a joinder in error, it does not abate the writ, and the defendant in error may proceed to get the judgment

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judgment affirmed, but must then revive it against the executor, &c. of the plaintiff in error.

After the record removed from *C. B.* into *B. R.* by writ of *error*, defendant died, and the plaintiff moved in *C. B.* for leave to take out a *sci. fa.* against defendant's executors. But on shewing cause, the rule was discharged. The record being removed out of *C. B.* the motion was improper in that court. *Barnes*, 206.

So a writ of error does not abate by the death of the defendant in error after *in nullo est erratum* pleaded. *Ld. Raym.* 1295.

Entry of *disseisee*, pending a writ of error, abates it. *Ld. Raym.* 476.—An abateable writ is abated as to a stranger. *Ibid.*

Where a writ of error abates by motion, the court must be moved to take out execution; but otherwise if for *variance*, *Salk.* 264. But now if the writ varies from the record, &c. it is amendable by 5 *Geo.* 1. c. 13.

If a writ of error abates or discontinues by the act and default of the party, a second writ shall be no *supersedeas*. *Keb.* 658. As if a plaintiff in error be nonsuit, he shall not have a writ of error again. *Salk.* 263. *pl.* 4. *Ld. Raym.* 91.

But if a writ of error abates by the act of God, or the law, a second writ of error will be a *supersedeas*. As where a writ of error abated by the death of the lord chief justice *Foster*, and a second writ of error was sued out and allowed, and it was held a *supersedeas*. *Keb.* 658.—So a second writ is a *supersedeas* upon abatement of the first writ of error by death.

Three join in bringing a writ of error, the defendant pleads outlawry in abatement as to one of them; but the court held this no good plea, because they are all compellable to join. *Palm.* 151.

Where two join in a writ of error, and one will not assign errors, the court will give the other time to summon and sever. *Stra.* 783. For if judgment is given against two, both ought to join in error—but if one dies after judgment, error may be brought by the survivor without the executor of the other. *Stra.* 234.

If one plaintiff assigns errors, he must do it in the name of all, except where the others are severed. *Mod. Cas.* 40.

If after a writ of error brought by *two*, and to a *scire facias quare executionem non* one only appears, summons and severance lies. *Yelv.* 4.

Of quaſhing and amending Writs of Error, of Abatement, Diſcontinuance, Summons, and Severance in Error, and of amending Judgments after Error brought, &c.

A. ſued *B.* in the *Common Pleas* in *Ireland*, and recovered—*A.* died, and his executors took out a *ſcire facias quare ex. non*, to which *B.* pleaded payment, and found againſt him, with 6*d.* damages; and the judgment was, that *they* ſhould have execution of the debt and damages aforeſaid, and alſo their *coſts and expences*, &c. and for *coſts de incremento*.—*B.* brought error in *B. R.* in *Ireland*, and only one of the executors appeared to the writ, who *alone* ſued out the *ſcire facias quare ex. non* in *B. R.* there; and yet, that court affirmed the judgment of *C. B.* for both, and adjudged, that both ſhould recover.—On which *B.* brought error into *B. R.* here, and though—1. Objection was taken that the court below had given damages for the non-payment, whereas damages cannot be given in a *ſci. fa.*——And 2. That the *ſci. fa.* in *B. R.* in *Ireland* was prayed by one executor *only*, though the writ of error was brought againſt *two*, and no ſuggeſtion that either is dead; yet *B. R.* in *England* affirmed the judgment. And as to the firſt objection they ſaid, "that the being damnified and put to coſts to the amount of 6*d.* was only meant as a foundation for the coſts *de incremento*; and the judgment is, that the plaintiffs ſhall recover 17*l.* 14*s.* 8*d.* for their coſts and expences, &c.—To the ſecond objection, The *ſci. fa. quare*, &c. is only a proceſs to bring the plaintiff in error in to aſſign errors; and as he came in and aſſigned errors, he waived any objection, and admitted the one executor to be ſufficient to call upon him to aſſign errors; and from this we are to preſume, that the other executor is dead: And though a writ of error by *one* alone, upon a judgment againſt *two*, is not good, it is upon account of the inconvenience that would ariſe from a perpetual delay of execution, if every defendant might bring a writ of error by himſelf; but that reaſon does not hold in this caſe, where the executors are *defendants* in error, and not *plaintiffs*. *Knox* v. *Coſtello*. *Burr. Rep.* 4 *pt.* 1789.

In an action for ſlander, verdict was for the plaintiff as to one ſet of words, and for defendant as to the other. And on error from *C. B.* into *B. R.* the errors aſſigned were, that there ought to have been a judgment for defendant as to the words of which he was acquitted, that he might be able hereafter to plead acquittal in bar of another action; and that the plaintiff ſhould have been amerced *pro falſo clamore* as to ſo much. The court

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court of *B. R.* thought the judgment inſupportable, but allowed the defendant in error to move the court of *C. B.* for leave to amend the record by the verdict, which was granted on a rule to ſhew cauſe; and then *B. R.* amended the record which had been ſent there, and affirmed the judgment. *Smith* v. *Fuller*, *Stra.* 786.

After error in *Cam. Scacc.* from *B. R.* the tranſcript was brought back and amended in *B. R.* by the original record there; and it was held neceſſary to make the amendment in *B. R.* becauſe this differs from the caſe of a writ of error from *C. B.* into *B. R.* for *C. B.* ſends up the very record, whereas *B. R.* only ſends the tranſcript. *Rutter* v. *Redſtone*. *Stra.* 837.

Plaintiff's attorney, after a writ of error brought artfully, delayed ſigning the final judgment till the writ of error was ſpent, and then brought an action of debt upon the judgment. The court ordered proceedings in the action upon the judgment to be ſtayed, and a new writ of error to be brought at plaintiff's attorney's expence. *Arden* v. *Lamley*. *Barnes*, 250.

After error brought on a judgment againſt an executor *de bonis propriis*, and *in nullo eſt erratum* pleaded, and on argument thereon in *Cam. Scacc.* it was moved in *B. R.* to amend the judgment by making it *de bonis teſtatoris ſi, &c. et de bonis propriis ſi non, &c.* And the amendment was granted contrary to 1 *Ld. Raym.* 182. *Short* v. *Coffin Exor. Burr. Rep.* 4 *pt.* 2730.

In debt upon a *mutuatus*, judgment was entered up as of *Hil.* 1700, whereas the borrowing appeared to be 2 *April*, 1701. Error being brought to reverſe this judgment, defendant in error moved to amend the judgment by the paper-book ſigned by the maſter, which was the 2 *Jan.* 1700. *Et per Cur.* It may be amended, for it is but a ſlip of the clerk, who ſhould have purſued the paper-book ſigned by the maſter, which is authentick enough to amend by. *Parſons* v. *Sill. Salk.* 51. Vide *Cro. El.* 147.

A judgment by *non ſum inform.* was ſigned *Dec. the* 22. by virtue of a warrant of attorney, dated *Oct.* 31. in *Mich. term*; and the roll was filed generally of the ſaid *Mich.* term. *Error* was brought; and afterwards, plaintiff's attorney moved to amend the record, according to the fact, by inſerting at the top of the roll from the day of *St. Martin in fifteen days in*

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Mich. term, &c. to prevent the judgment's having relation to the *eſſoign day* of the firſt return, which would have vitiated it; the day laid in the declaration on a *mutuatus*, being *Oct.* 31. (the date of the warrant of attorney); and upon hearing the attornies on both ſides, in the treaſury in *C. B.* the amendment was ordered. *Deacon* v. *Vivian. Barnes*, 7.

After error brought, and *in nullo eſt erratum pleaded in B. R.* it was moved in *C. B.* to amend the judgment roll, by ſtriking out, that *the plaintiff ought to recover*; and inſerting, that *the plaintiff do recover*; which was ordered on payment of coſts, provided that the defendant do not farther proſecute his writ of error; but if he proceeds in error, then without coſts. *Foſter* v. *Blackwell. Barnes*, 7.

Rule to ſhew cauſe, why final judgment on verdict in *C. B.* ſhould not be amended in particulars, after writ of error and record tranſcribed; but the tranſcript not carried into the *King's Bench*. The amendments were to inſert words agreeable to the ſtanding form uſed by the clerks of the judgments: ſome other little miſtakes which were *vitium clerici*; and to make a juryman's name *Marſhal*, inſtead of *Marſhell*; by the panel, *&c.* to make the record conſiſtent; on reading the *poſtea, habeas corpora* and *panel*. *Barnes*, 18.

A court of error may award a *venire de novo*. *Dougl.* 703.

Of

Of False Judgment.

A Writ of *false judgment* lies where an erroneous judgment is given in any court not of record, in which the ſuitors are judges. *F. N. B.* 18. *a.*——

If there are no *ſuitors* by whom the plaint may be certified, there ſhall not be *falſe judgment*, as in a copyhold court; in which, upon an erroneous proceeding, the copyholder muſt ſue to the lord by petition. *F. N. B.* 18. *b.*

A writ of falſe judgment upon a judgment in the ſheriff's court, is in the nature of a *recordari*. *F. N. B.* 18. *a. b.*

And upon a judgment in another court, not of record, it is in the nature of an *accedas ad curiam*. *Ibid.*

A writ of falſe judgment may be ſued by any one againſt whom judgment is given, his heir, executor, or adminiſtrator.

Or by any one who has damages, though the other defendants do not join as they ought to do in *error*. *R. Mod.* 854.

A writ of *falſe judgment* iſſues as a *writ of error* out of *Chancery*, upon application to the proper *curſitor*.

Upon the return of the writ and the whole record certified, and not before, the plaintiff ſhall aſſign his errors. *F. N. B.* 18. *i.*

And he may have a *ſcire facias ad audiendum errores*, as in error. *F. N. B.* 18. *f. g.* Or now he may ſerve a rule as in caſes of error.

Or, if the defendant has day by the roll, the plaintiff may aſſign errors without a *ſcire facias* againſt him.

The writ of *falſe judgment* ought to be ſerved in court. 6 *Hen.* 7. 16. *a.*

And being ſerved, ſhall be a *ſuperſedeas* to all proceedings below. 6 *Hen.* 7. 15 *b.*

Upon *two ſci. fa. ad aud. errores* awarded, and *nihils* returned, or *ſcire feci* and default made, the judgment ſhall be reverſed.

If a writ of falſe judgment abates, or the plaintiff therein is nonſuited, the defendant ſhall have a *ſcire facias quare executionem non*. *F. N. B.* 18. *g.*

If upon falſe judgment brought, which ought to be ſerved in court, and the lord refuſes to hold his court, a *diſtringas tenere curiam* goes againſt him. 6 *Hen.* 7. 16. *a.*

When the parties are once in court, the ſubſequent proceedings in *falſe judgment* are the ſame as in error.

A writ of falſe judgment was delivered to the under-ſheriff, but no money was tendered or paid for the return; for want whereof, the ſheriff took no notice of it, and executed a writ *de executione judicii*. Upon hearing counſel on both ſides, the

ſheriff's proceeding was now held to be regular. *Per Cur.* The defendant, if he think fit, may proceed on his writ of falſe judgment. *Gale* v. *Hooker*. *Barnes*, 199.

The form of a writ of *falſe judgment* and return into *C. B.*

George the Third by the grace of God of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth. To the ſheriff of *Berks*, greeting. If *C. D.* ſhall give you ſecurity that his ſuit ſhall be proſecuted then in your full county, cauſe the plaint to be recorded, which was in the ſame county without our writ between *A. B.* and the ſaid *C.* of a certain plea of treſpaſs on the caſe done to the ſaid *A.* by the ſaid *C.* as it is ſaid, wherein the ſaid *C.* complaineth that falſe judgment hath been given againſt him in the ſaid county; and have you the ſame record before our *juſtices at Weſtminſter*, *from Eaſter in fifteen days* under your ſeal, and the ſeal of four lawful knights of the ſame county, of ſuch as ſhall be preſent at the ſaid record, and ſummon, by good ſummoners, the ſaid *A.* that he be then there to hear the ſaid record; and have you there the names of the ſummoners and of the ſaid four knights, and this writ. Witneſs ourſelf at *Weſtminſter* the ——— day of ——— in the 21*ſt* year of our reign.

By the lord chancellor of *Great Britain*, at the inſtance of the defendant.

By virtue of this writ to me directed in my full county held at *Abingdon* the 17th day of *March*, in the 21ſt year of the reign of our ſovereign lord *George* the Third, by the grace of God of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth, I cauſed the plaint to be recorded, which is in the ſame court, without the writ of our ſaid ſovereign lord the king, between *A. B.* and *C. D.* in a certain plea of treſpaſs on the caſe done to the ſaid *A.* by the ſaid *C.* as it is ſaid, wherein the ſaid *C.* complaineth, that falſe judgment hath been given againſt him in the ſaid county, which ſaid plaint appears in a certain ſchedule to this writ annexed; and I have the ſaid record before the juſtices within written, at the day and place within mentioned, under my ſeal, and the ſeals of four lawful knights of the ſame county, of ſuch who were preſent at the ſaid record; and I have prefixed the ſame day to the parties within written, that then they might be there ready to proceed in the ſaid plaint, as ſhould be juſt according to the exigency of the ſaid writ.

E. F. ſheriff.

The

The form of the ſchedule annexed to the return:

At the ninth county court of *O. P.* Eſq; late ſheriff of the county of *Berks*, held at *Abingdon* in and for the ſaid county, the 18th day of *October*, in the twentieth year of the reign of our ſovereign lord *George* the Third, by the grace of God of *Great Britain*, and ſo forth: And in the year of our Lord one thouſand ſeven hundred and ſeventy-nine, before *G. H. I. K. L. M.* and others, free ſuitors of the ſaid court, came *A. B.* in his proper perſon, and complained againſt *C. D.* of a plea of treſpaſs on the caſe, *&c.* And he found pledges for proſecuting his ſaid plaint, to wit, *John Doe* and *Richard Roe*; and puts in his place *John Dixon* his attorney, againſt the ſaid *C.* of the ſaid plea, and it is granted to him. And thereupon it is commanded to *Thomas Wall*, bailiff and miniſter of the ſaid court, that he put by ſurety and ſafe pledges the ſaid *C.* ſo that he may be at the next county court, before the ſaid ſuitors of the ſaid court, at *Abingdon* aforeſaid, to be held the fifteenth day of *November*, in the twentieth year aforeſaid, to anſwer to the ſaid *A.* of his ſaid plea; the ſame day is given to the ſaid *A.* here, *&c.*

At the tenth county court of the ſaid late ſheriff *O. P.* Eſq; held at *Abingdon*, in and for the ſaid county, the fifteenth day of *November*, in the twentieth year of the reign of our ſovereign lord *George* the Third, by the grace of God of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, *&c.* and in the year of our Lord one thouſand ſeven hundred and ſeventy-nine, before *I. K. L. M.* and others, free ſuitors of the ſaid court, came the ſaid *A.* by his attorney aforeſaid, and offered himſelf againſt the ſaid *C.* of his plea aforeſaid; and the ſaid *Thomas Wall*, bailiff and miniſter of the ſaid court, now certifies to the ſame court, and returns to the ſaid court here the ſaid precept, to him in form aforeſaid directed, and that he had put by ſureties, and ſafe pledges, to wit, *John Denn* and *Richard Renn*, the ſaid *C.* that he might be here at this day to anſwer the ſaid *A.* of the plea aforeſaid, as it was commanded to him; upon which the ſaid *C.* being ſolemnly required, came here in his proper perſon to anſwer the ſaid *A.* of the plea aforeſaid; and puts in his ſtead *Peter Blake*, his attorney, againſt the ſaid *A.* of the plea aforeſaid; and thereupon the ſaid *A.* prays a day to declare againſt the ſaid *C.* in the ſaid plea here, until the next county court, to be held in and for the ſaid county, at *Abingdon* aforeſaid, to wit, the thirteenth day of *December*, in the ſaid twentieth year of the reign aforeſaid; and it is granted to him, *&c.* and the ſame day is given to the ſaid *C.* here, *&c.*

And at the eleventh county court of the said late sheriff, held at *Abingdon* aforesaid, in and for the said county, the thirteenth day of *December*, in the twentieth year of the reign of our sovereign lord *George* the Third, by the grace, &c. and in the year of our lord one thousand seven hundred and seventy-nine, before *W. S. T. R.* and others, free suitors of the said court, came, as well the said *A.* as the said *C.* by their attornies aforesaid; and hereupon the said *A.* then declares in the said plea, in form following, that is to say, the county court of the said county of *Berks*, to wit, *A. B.* complains against *C. D.* of a plea of trespass upon the case, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*. And whereas the same *A. B.* by *John Dixon* his attorney, complains, that whereas the said *C. D.* [here insert the whole declaration.]

And the said *C.* by *Peter Blake* his attorney, defends the wrong and injury, when, &c. and prays leave to imparl thereupon here until the next county court, to be held in and for the said county, at *Abingdon* aforesaid, to wit, on the tenth day of *January*, in the said twentieth year, and he hath it, &c. The same day is given to the said *A.* here, &c. And at the twelfth county court of the said late sheriff, held at *Abingdon*, in and for the said county, the tenth day of *January*, in the twentieth of the reign of our sovereign lord *George* the Third, by the grace of God, &c. and in the year of our Lord one thousand seven hundred and eighty, before *W. S. T. P. S. R.* and others, free suitors of the said court, came, as well the said *A.* as the said *C.* by their attornies aforesaid; and thereupon the said *C.* as before, defends the wrong and injury, when, &c. and says, &c. [here insert the plea, &c. and replication, if it was at the same court; if not, then a continuance till issue was joined.] And the said *A.* doth so likewise. Therefore it is commanded to *Thomas Wall*, bailiff and minister of the said court, that he cause to come here at the next county court, to be held in and for the said county, at *Abingdon* aforesaid, to wit, on the 7th day of *February*, in the twentieth year of the reign aforesaid, twelve good and lawful men of *Abingdon* aforesaid, and within the jurisdiction of the said court, by whom the truth of the matter might be better known, and who are neither of kin to the said *A.* nor to the said *C.* to make a certain jury of the country, between the parties of the said plea, because, as well the said *A.* as the said *C.* between whom the contest is, have put themselves upon that jury; the same day is given by the said court here, as well to the said *A.* as to the said *C.* here, &c.

And at the thirteenth county court of the ſaid late ſheriff, held at *Abingdon* aforeſaid, in and for the county aforeſaid, the ſeventh day of *February*, in the twentieth year of the reign of our ſovereign lord *George* the Third, by the grace of God, *&c.* and in the year of our Lord one thouſand ſeven hundred and eighty, before *I. D. T. P. S. R.* and others, free ſuitors of the ſaid court, come as well the ſaid *A.* as the ſaid *C.* by their attornies aforeſaid. And the ſaid *Thomas Wall*, bailiff and miniſter of the ſaid court, returned his ſaid precept of *venire facias* to him in form aforeſaid, directed in all reſpects, ſerved and executed. And the ſaid jury, in form aforeſaid impanelled, being ſolemnly required, come, and twelve of them, to wit, *G. H. I. K. &c. &c.* who, to ſpeak the truth of and upon the premiſes above-mentioned, being choſen, tried, and ſworn, by the ſaid court, there upon their oaths ſay, that the ſaid *C.* [here inſert the verdict], and aſſeſs the damages of the ſaid *A.* by occaſion of the ſaid premiſes, beſides his coſts and charges by him about his ſuit in this reſpect laid out to 30 ſhillings, and for thoſe coſts and charges 6 pence. Therefore, it is conſidered by the ſaid court here, that the ſaid *A.* ſhould recover againſt the ſaid *C.* his ſaid damages, coſts and charges, to 30 ſhillings and 6 pence, aſſeſſed by the ſaid jury, in form aforeſaid; and alſo 54 ſhillings and 2 pence to the ſaid *A.* at his requeſt, by the ſaid court here adjudged, for his increaſed coſts and charges; which ſaid coſts and charges amount in the whole to 4*l.* 4*s.* 8*d.* and the ſaid *C.* in mercy, *&c.*

And at the firſt county court of me *E. F.* Eſquire, the preſent ſheriff of the county of *Berks* aforeſaid, held at *Abingdon* in the ſame county, the 7th day of *March*, in the year aforeſaid, before *I. K. T. R. W. S.* and *O. M.* four lawful knights of the ſame county, I cauſed the ſaid plaint, proceedings and judgment, between the parties aforeſaid, to be recorded as the writ hereunto annexed requires; in teſtimony whereof, as well I the ſaid ſheriff, as the ſaid *I. K. T. R. W. S.* and *O. M.* who were preſent at the ſaid record, have cauſed our ſeals to be hereunto put, the day and place laſt above-mentioned. *E. F.* Eſq; ſheriff.

Upon the return of the writ, the plaintiff in error muſt aſſign his errors in the following manner:

And hereupon the ſaid *C.* ſays, that *falſe judgment* is given againſt him in the proceedings aforeſaid, in many inſtances; that is to ſay in this, that in the ſaid declaration, the ſaid record above ſpecified, there is not any poſitive allegation that

that the said *A.* doth complain against the said *C.* for the said supposed breach of promise in the said declaration specified, but the same is only alledged by way of recital; and also in this, that it doth not appear, &c. [and so on, reciting the errors as they appear on the record.] And so the said *C.* says, that in the said court of the said county, false judgment hath in divers instances being given against the said *C.* in and upon the said plaint; and he prays that the said judgment, for the said defects, and for others in the said record appearing, may be reversed, annulled, and utterly made void, as being false and erroneous; and that the said *C.* may be restored to every thing which he has lost on occasion of the said judgment, and that the said justices here may proceed to the examination of the said premises.

The serjeant's or counsel's name who signs it.

And the said *A. B.* says, that there is no error in the proceedings aforesaid, nor is any false judgment given against the said *C. D.* upon the said plaint mentioned in the said record above specified; and he prays that the said justices here may proceed to the examination of the said record, and to the reformation and correction of the false judgment, if any such may be found, or appear to be given therein, &c.

Of

Of the Writ of Habeas Corpus.

AN *habeas corpus* is a writ for bringing the body of him who is impriſoned, before the court, *cum cauſâ detentionis*, and is the proper remedy wherever a perſon is reſtrained of his liberty by being confined in a common gaol; or by a private perſon, whether it be for a criminal or a civil cauſe, to have his body and cauſe removed to ſome ſuperior juriſdiction, which hath authority to examine the legality of ſuch commitment; and on the return thereof, either bail, diſcharge, or remand the priſoner. *Vaugh.* 136.

Of this writ of *habeas corpus* there are various ſorts, *viz.* The *habeas corpus ad ſubjiciendum*, which iſſues in *criminal* caſes, regulated by the *Habeas Corpus* act, 31 *Car.* 2.

Alſo the *habeas corpus ad deliberandum et recipiendum*, another writ iſſuing in *criminal* caſes to remove a perſon to the proper place where he committed an offence, to be tried.

Alſo, the *habeas corpus ad reſpondendum*, which iſſues where one has a cauſe of action againſt a perſon (already confined for a cauſe of action accruing within an inferior juriſdiction), to charge him with this new action in a ſuperior court.

Alſo, the *habeas corpus ad ſatisfaciendum*, which iſſues after a judgment.

But the writ of *habeas corpus*, of which it will be neceſſary to treat here, is that of *habeas corpus ad faciendum et recipiendum*, which iſſues only in *civil* caſes, and lies where a perſon is ſued and in gaol, in ſome inferior juriſdiction, and is willing to have the cauſe determined in ſome ſuperior court, which hath juriſdiction of the matter. This writ is uſually called an *habeas corpus cum cauſâ*, and is grantable at all times of common right, whether in term or vacation, without any motion in court, as it relates to a civil matter only; and upon the delivery thereof to the officer or court below, it inſtantly ſuperſedes all the proceedings therein; whereas an *habeas corpus ad ſubjiciendum* muſt in term time be awarded on motion, and with leave of the court. 2 *Mod.* 306. 1 *Lev.* 1.

Of

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THE court of *Common Pleas*, as well as the *King's Bench*, has a general juriſdiction to grant writs of *habeas corpus* in all caſes whatſoever; but if, upon the return of ſuch writ to the court of *Common Pleas*, it appears that the body was in cuſtody for any *criminal matter*, that court cannot take cognizance of it. See *Wood*'s caſe. 3 *Wilſ.*

The writ of *habeas corpus* is engroſſed on a five ſhilling ſtamped piece of parchment, which is made out upon a note given to the office, and in *B. R.* is ſigned by the ſigner of the writs; in *C. B.* by the *prothonotary*, who takes fees to the amount of ſix or ſeven ſhillings.

In ſuing out the writ, care muſt be taken to ſtate the ſtile of the court, or perſon to whom it is to be delivered, with accuracy.

The liberty which every defendant had, againſt whom an action was commenced in an inferior court, of removing it into a ſuperior court at *Weſtminſter* to be determined, was formerly very much abuſed; as it was uſual for a defendant to ſue out a writ of *habeas corpus cum cauſâ*, and keep the ſame in his pocket till iſſue was joined, the jury ſworn, and the plaintiff below had actually given his evidence, and then to produce the writ, and ſuſpend all further proceedings; by which piece of knavery, the defendant, from a knowledge of the evidence produced by the plaintiff, had an opportunity of making a better defence hereafter, when the cauſe came to be tried. But to prevent this abuſe for the future, by the 43 of *Eliz. c.* 5. it is enacted, "That no writ of *habeas corpus*, or other writ ſued forth by "any perſon whatſoever, out of any of her majeſty's courts of "record at *Weſtminſter*, to remove any action, ſuit, plaint, or "cauſe, depending in any inferior court, having juriſdiction "thereof, ſhall be received or allowed by the judges or officers "of ſuch court wherein or to whom ſuch writs ſhall be deli-"vered (but they may proceed therein, as if no ſuch writ were "ſued forth or delivered), except that the ſaid writ or writs be "delivered to ſuch judges or officers of the ſaid court, *before "that the jury, which is to try the cauſe in queſtion, and the party "that ſued forth the ſaid writ, or for whoſe benefit it was ſued "forth, have appeared, and one of the ſaid jury ſworn to try the "ſaid cauſe.*"

And by the 21 *Jac.* 1. *c.* 23. *ſ.* 2. it is enacted, "That no "writs of *habeas corpus*, *certiorari*, or other writ ſued forth to "remove any action or ſuit commenced in any inferior court, "having juriſdiction thereof, ſhall be allowed by the ſteward,

"judges,

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" judges, or officers thereof, unleſs delivered before *iſſue* or *de-*
" *murrer* joined in the ſaid cauſe ſo depending, ſo as the ſaid
" iſſue or demurrer be not joined within ſix weeks next after
" the arreſt or appearance of the defendant to ſuch action or
" ſuit."

And by *ſect.* 3. " If any ſuch action or ſuit ſo as aforeſaid
" commenced in ſuch inferior court be removed by any writ or
" proceſs, and afterwards remanded back by writ of *procedendo*
" or other writ, that then the ſaid action or ſuit ſhall never af-
" terwards be removed or ſtayed before judgment, by any writ
" out of any court whatſoever."

And by *ſect.* 4. it is enacted, " That if in any action or ſuit,
" not concerning any freehold or inheritance, or title of lands,
" leaſe or rent, be commenced or depending in ſuch inferior
" court of record, it ſhall appear or be laid in the declaration,
" that the debt, damages, or things demanded, do not exceed
" 5*l.* then ſuch action or ſuit ſhall not be ſtayed by any writ
" whatſoever, other than writ of error or attaint."

And by the *ſect.* 6. it is provided, " That this act ſhall ex-
" tend only to ſuch inferior courts of record, and for ſo long
" time only, as there is or ſhall be *an utter barriſter of three*
" *years ſtanding at the bar of the four inns of court*, ſteward
" or under-ſteward, town-clerk, judge, or recorder of ſuch
" inferior court, or aſſiſtant to the judge or judges of the ſame,
" as ſhall not be an utter barriſter of that ſtanding, *and there*
" *preſent*, and not of counſel in any action or ſuit there de-
" pending *."

After this ſtatute was made, it was uſual for defendants, in order to evade the *fourth clauſe* thereof, to ſet up a fictitious action againſt themſelves (when the ſuit below was under 5*l.*) for a pretended demand of 5*l.* or upwards, and then bring an *habeas corpus* thereon, which writ removed all cauſes againſt them in that court; and thereby, notwithſtanding this clauſe,

* On ſhewing cauſe againſt a *procedendo* to the borough court of *Portſmouth*, it was urged, that they had tried the cauſe *without the preſence of an utter barriſter of three years ſtanding*. [The cauſe was tried before an attorney, who was deputy to the judge of the court, who was of more than three years ſtanding.] It was held, that by the ſtat. 21 *Jac.* 1. ſuch utter barriſter ought in all events to be *preſent* at the trial. *Procedendo* denied; and rule to ſhew cauſe diſcharged. *Fauley* v. *M'Connell*, *Burr. Rep.* 4 *pt.* 515.

the

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the ſmaller action under 5 *l.* was removed into the ſuperior court, to the prejudice of many poor plaintiffs, who, for want of means to carry on a ſuit in the ſuperior court, were obliged often to deſiſt from proſecuting, and ſubmit to the loſs of their demands.

But by 12 *Geo.* 1. *c.* 29. *ſ.* 3. to prevent ſuch practice in future, it is enacted, "That the judges of ſuch inferior courts "of record, as are deſcribed in the ſtatute of *Ja.* 1. may pro- "ceed in ſuch actions commenced as are therein ſpecified, "which appear or are laid not to exceed the ſum of *five pounds*, "although there may be other actions againſt ſuch defendant, "wherein the plaintiff's demands may exceed the ſum of 5 *l.*"

The ſtatute of 12 *Geo.* 1. *c.* 29. empowers the plaintiff, upon an affidavit made and filed that his cauſe of action amounts to *ten pounds* or upwards, to arreſt the defendant by proceſs out of the ſuperior courts.—And where the cauſe of action amounts to *forty ſhillings* or upwards, within the juriſdiction of inferior courts, to arreſt the defendant by proceſs out of ſuch inferior courts. But this being found very inconvenient, and prejudicial to the lower claſs of people, by putting it in the power of any one to whom they were indebted in forty ſhillings, within the juriſdiction of the *Marſhalſea*, or other inferior court, to arreſt and impriſon them, the ſtat. 19 *Geo.* 3. *c.* 70. extends the former part of the 12 *Geo.* 1. *c.* 19. to *inferior* courts; ſo that neither in the *ſuperior* nor *inferior* courts, can any one now be *arreſted, or held to ſpecial bail*, unleſs by proceſs founded on an affidavit duly made and filed in the court, that the cauſe of action amounts to *ten pounds* or upwards.—But to prevent inconveniencies and delay to plaintiffs proſecuting for ſmall debts in ſuch inferior courts, by the ſame ſtatute, 19 *Geo.* 3. *c.* 70. it is further enacted, "That no cauſe, where "the cauſe of action ſhall not amount to the ſum of 10 *l.* or up- "wards, ſhall be removed or removable into any ſuperior court "by any writ of *habeas corpus, or otherwiſe*, unleſs the defend- "ant, who ſhall be deſirous of removing ſuch cauſe, ſhall en- "ter into a recognizance, with two ſureties, in double the ſum "laid *in the court from which it is to be removed*, for payment of "the debt and coſts, in caſe judgment ſhall paſs againſt him."

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, when grantable, and to what Places.

BY *Reg. Mich.* 1654. *ſect.* 7. A writ of *habeas corpus* to remove the body of a priſoner directed to the ſheriffs of *London* or *Middleſex*, the judges of the *Marſhalſea court*, or inferior courts within five miles of *London*, may be granted in vacation or term time, returnable immediately; but if the *habeas corpus* be directed to any other ſheriff, or court farther diſtant, it muſt be returnable at a day certain in court, unleſs it be to deliver over a priſoner in diſcharge of his bail, *Prax. U. B.* 1.

But notwithſtanding the above rule in both courts, it was held in *B. R.* in the caſe of *Doctor Bettesworth* v. *Bill. Burr.* 4 *pt.* 1875. That ſuch writ of *habeas corpus ad faciendum et recipiendum*, directed to a gaoler, *&c.* of an out county, may be returnable before a *judge*, and *immediate*, as well as on a day certain in term. And it was there ſaid, that the above rule, *Mich.* 1654. was fallen long ſince into diſuſe.

The writ of *habeas corpus* being a prerogative writ, lies by the common law to any part of the king's dominions, for he ought to have an account why any of his ſubjects are impriſoned. 1 *Rol. Abr.* 69. *Cro. Jac.* 543. It lies to *Jerſey* and *Guernſey*. *Vent.* 347. *Sid.* 386.—To *Berwick* and *to counties palatine*. *Latch.* 160. 3 *Keb.* 279. And to the *marſhes of Wales*, as it does to all other courts which derive their authority from the king, as all the courts exerciſing juriſdiction within his dominions do; and that it being a prerogative writ, does not come within the rule *brevia domini regis non currunt*, &c. for that muſt be underſtood of writs between party and party. 2 *Rol. Abr.* 69. *Wetherley* v. *Wetherley*.

But an *habeas corpus ad faciendum et recipiendum* does not lie to the cinque ports, at the ſuit of a ſubject. *Vide Bac. Abr.* and authorities there cited. 3 *Vol.* 4.

One who is in cuſtody at the ſuit of the plaintiff in the *Marſhalſea court*, cannot be removed by an *habeas corpus ad reſpondendum*, to anſwer to the plaintiff for the *ſame* debt in a new action in *B. R. Cowp.* 116.

The

The Form of the Writ of HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM.

THE form of the writ of *habeas corpus cum causâ*, &c.

GEORGE the Third, &c. To the [describe the sheriff, judge, or steward of the court to which it is directed properly] greeting. We command you, that you have the body of *C. D.* detained in your prison under your custody, as it is said, by whatsoever name he may be called, in the same, together with the day and the cause of the taking and detaining the said *C. D. before our right trusty and well beloved William earl of Mansfield, our chief justice, assigned to hold pleas in our court before us* [or if in *C. B. before Sir William de Grey, knight, our chief justice of the Bench*], at his chambers, situate in *Serjeant's Inn*, in *Chancery-lane*, [or if it be returnable in term, make it returnable at a day certain in term], immediately after the receipt of this our writ, to do and receive all and singular those things which our said chief justice shall then and there consider, of him in this behalf; and have there this writ. Witness, &c.——

If the writ be returnable before the chief justice, any other judge of the court may commit the defendant to the prison of the court.

Besides the fees paid upon suing out the writ, and sealing the same, fees are paid in the inferior court to the sheriff, or judge thereof, for the allowance of the writ, for the return thereof, for the number of causes there happen to be against the defendant in such inferior court, &c. Also fees paid upon the warrant to the bailiff to bring him up, and to the gaoler to deliver him, besides the fees paid at the judge's chambers; or if it is returnable in court, to the secondary, crier, tipstaff, &c. to the amount sometimes of three or four pounds.

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THE writ of *habeas corpus*, immediately upon being ſerved, ſuſpends the power of the inferior court; and if they proceed afterwards, the proceedings are void, and *coram non judice*. 1 *Salk.* 352. *Cro. Car.* 261. 2 *Jones*, 209. 2 *Mod* 195.

A *habeas corpus* to the town court of *Nottingham*, was delivered to the proper officer in open court, to remove a plaint from that court before trial, yet the court below went on to the trial; and defendant moved for an attachment againſt the ſheriff, for proceeding to trial after *habeas corpus* delivered, and rule made to ſhew cauſe. On ſhewing cauſe it appeared, that the iſſue was joined 27th of *April*, and the *habeas corpus* was not delivered till *May*, ſo the court below was warranted to proceed [vide 21 *Jac.* 1. *ante.*] And the rule was diſcharged. *Barnes*, 221.

The record itſelf is not removed by *habeas corpus* as it is by *certiorari*, but remains below; and the return is only a hiſtory of the proceedings.

The writ muſt be returned by the ſame perſon to whom it is directed; and where the writ was awarded to a ſheriff, who before the return left his office, and a new ſheriff was made who returned *languidus*, the court held the return not good; but it ought to be returned by the two ſheriffs; by the old ſheriff that he had the body, and had delivered it to the new ſheriff; and then the new ſheriff might have returned *languidus*. *Peck* v. *Creſſett. Paſ.* 26 *Car.* 2.

The writ muſt be returned, otherwiſe an *alias* and *pluries* goes; and after that, an *attachment*,

A defendant being in cuſtody of the ſheriff of *Briſtol*, brought an *habeas corpus* to be removed to the *Fleet*, and tendered it to the ſheriffs, with ſeven guineas (exceeding 1 *s. per* mile), which the ſheriffs refuſed to accept, inſiſting on 10 *l.* On which the defendant moved for an attachment againſt the ſheriffs; which, on ſhewing cauſe, was made abſolute. *Barnes*, 377.

It was held, that the ſheriff upon an *habeas corpus* is not bound to bring up the priſoner, unleſs reaſonable charges be tendered him. *Cox* v. *Dowl. Hil.* 20 & 21 *Car.* 2.

But in *Hopman* v. *Barber*, *Stra.* 814. It was held ſince, that the officer muſt obey the writ of *habeas corpus*, though the party refuſes to pay him his fees, for he has a remedy for them.

But then the court will not, upon his being brought up, order him to be turned over to the priſon of the court, till the officer is ſatisfied his charges for bringing him up. *Vide Stra.* 308.

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An *habeas corpus cum causâ* went to the portreeve of *Yeovil* in *Somersetshire*, who returned, *that before the coming of the writ the party was bailed*; and the plaintiff's counsel moved for a better return; and it was ruled, that he should make a better return; for though the body be bailed, he ought to return the cause—and the body cannot be bailed after the writ received. *Salmon* v. *Slade*. *Hil.* 25, 26 *Car.* 2.

An *habeas corpus* went to the *stannary* court, to which an insufficient return was made, and therefore disallowed. *Et per Cur.* The warden of the stannaries must be amerced, and you may go to the coroners and get it affeered, and estreat it; and an *alias habeas corpus* must go for the insufficiency of the return to the first, and upon that the body and cause must be removed up; if another excuse be returned, we will grant an attachment. *Salk.* 350. *pl.* 8.

Where an *habeas corpus* is directed to an inferior court, and the steward has liberty to proceed by the 21 *Jac.* 1. *c.* 23. yet the writ must be returned with the *special matter*, or the person to whom it is directed will be in contempt. *Carth.* 69.

Where an *habeas corpus* is properly sued out, so as to suspend the proceedings, it is sufficient for the party to whom it is directed, to return generally the cause for which the party is in custody with the body; but where the *habeas corpus* is irregular, or the court proceeds afterwards, they must return the whole *special matter*.

On an *habeas corpus* to the mayor, *&c.* of *Hertford*, to remove a cause out of the court of that borough, they returned, and set out their charter, empowering them to hold a court, *&c.* as far as was necessary: then the action against defendant [which was on simple contract to plaintiff's damage of 9*l.*], the judgment by default, writ of enquiry, final judgment, the award of a *ca. sa.* the return and commitment of defendant in execution to their gaoler. And they moreover returned, that the writ of *habeas corpus* did not arrive till after *interlocutory judgment*; that defendant on the arrival of the writ was not in custody; and that he did not on the arrival of the writ, or afterwards, enter into or offer bail to the court for payment of the debt and costs according to the statute 19 *Geo.* 3. *c.* 70. *s.* 5 & 6. [the cause of action not amounting to 10*l.*] and he being desirous of removing it. Defendant was brought in *Easter term* before Mr *Justice Buller* at chambers; but the judge observing the return thus *special*, and that this was a new case on the stat. 19 *Geo.* 3 ordered

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ordered defendant to be brought up in court. When defendant was brought up, and the return read, the *plaintiff* below moved to have him remanded. *Et per tot. Cur.* He muſt be remanded. Defendant's counſel objected to the return as too ſpecial and long. *Sed per Cur.* The return is proper, and would not have been good otherwiſe. The court proceeded after the arrival of the writ; and for want of *bail*, according to the ſtatute, the writ did not ſuſpend the proceedings: they were forced, therefore, to make a *ſpecial return*. Plaintiff then moved for the coſts of bringing him up, grounding his motion on defendant's irregularity. *Et per Cur.* Be it ſo; let the coſts be taxed, and the amount thereof inſerted in the rule to remand him; whereby the *gaoler* may detain him *quouſque* the coſts are paid. *Staines* v. *Grant*. *Eaſt.* 22 *Geo.* 3.

An *habeas corpus* was ſued to remove a cauſe out of *London*; the plaintiff prayed a *procedendo*, becauſe the action was for calling the plaintiff *whore*, which is not actionable elſewhere.—The defendant's counſel alledged, that neither of the parties lived in *London*, nor were the words ſpoken there. And *per Hale*, ch. juſt. If the words were not ſpoken there, the plaintiff ſhall not have a *procedendo*, for the words may be made actionable every where, by laying them in *London*. 2 *Rol. Abr.* 69.

In a like action in *London*, before declaration, an *habeas corpus* was brought to remove it into *B. R.* to which the ſheriffs returned generally, *that at ſuch a court came the plaintiff, and levied his certain plaint againſt the defendant in a plea of treſpaſs on the caſe, to the damage of* 500 l. *whereupon iſſue was joined, which remains ſtill undetermined, &c.* And upon the return a *procedendo* was prayed, upon a ſuggeſtion, that the action was commenced for calling plaintiff whore, which is actionable in *London*, and not elſewhere; therefore if a *procedendo* ſhould be denied, plaintiff would loſe her action, and by this means all ſuch actions would be loſt; and an affidavit was produced, in which plaintiff depoſed, that the only cauſe of action was *ut ſupra*. *Per Holt*, it does not appear by this return, what was the cauſe of action. The declaration itſelf ought to be returned upon the *habeas corpus*, and then the court would ſee what the cauſe of action was. And if the writ was delivered before the plaintiff had declared, yet he ought immediately to have entered his declaration, that it might be returned upon the writ. For all the proceedings in this caſe of a *cuſtom* ought to be returned, as well as in an action upon a *bye-law*. Afterwards the return was

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amended, and then the court granted a *procedendo*. *Watſon* v. *Clerke*. *Carth.* 75.

On an *habeas corpus* to the ſheriffs of *London*, they returned an action on a *bye-law*, with a penalty; and then it was moved to have the return filed. *Per Holt.* 1. If a record is once filed here, it can never after be remanded, either in the term it is filed, or any other.—2*d*. The record itſelf is never removed by *hab. corp.* the return is only an account of the proceedings; and when it is removed the plaintiff muſt declare *de novo* againſt the defendant *in cuſtodia mareſchalli, &c.* 3*d*. The *hab. corp.* immediately ſuſpends the power of the court below. 4*th*. The return in this caſe may be filed, becauſe the very record is not returned, and therefore will not be filed; of conſequence then a *procedendo* may be granted, becauſe it will not ſend out any record filed, but only remove the ſuſpenſion. Accordingly, the writ being filed, a *procedendo* was awarded. *Salk.* 352.

An action againſt a *feme* covert, as ſole trader, may not be removed by *habeas corpus* from the city courts. *Pope* v. *Vaux and wife*. *Eaſt.* 16 *Geo.* 3. *C. P.* 2 *Blackſ. Rep.* 1060.

If a writ of *habeas corpus* is made returnable *immediatè*, it ought to be returned the ſame day it is delivered, and the body brought up immediately.

By the old rule, *Mich.* 1654, all writs of *habeas corpus* directed to any ſheriff or officer of an inferior court, at above the diſtance of *five* miles from *London*, if made returnable in *Hilary* or *Trinity* terms, muſt be made returnable at a day certain preceding the ſecond return of thoſe terms, in order, if bail be required thereon, the plaintiff may be enabled to declare of the ſame term, and the defendant ſhall be obliged to plead to iſſue as of theſe terms, ſo that the plaintiff may try his cauſe the next aſſizes, if he thinks fit; or in default of pleading, that judgment may be entered againſt defendant of the ſame term, if rules to plead are given in due time.

And if the *habeas corpus* is ſued out in *Hilary* or *Trinity* terms, or the beginning of the vacations of thoſe terms, the writ muſt be made returnable the firſt or ſecond return of the ſubſequent terms, *viz. Eaſter* or *Michaelmas*, or the plaintiff, on ſummons before a judge, may have a *procedendo*.

After interlocutory, and before final judgment in an inferior court, an *habeas corpus cum cauſâ* was brought; before the return of the writ the defendant died, and a *procedendo* was awarded; becauſe, by the 8 & 9 *W.* 3. *c.* 11. the plaintiff may have a

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ſcire facias againſt the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreaſonable. *Salk.* 352.

A cauſe was removed, after *interlocutory*, and before *final* judgment, by *habeas corpus*, and a *procedendo* was refuſed, becauſe this is not within the words of the act 21 *Jac.* 1. *c.* 23. which are, that the *habeas corpus*, *certiorari*, *&c.* ſhall not be received or allowed, but that the inferior judge may proceed; except the writ be delivered to ſuch inferior judge, *&c.* before *iſſue* or *demurrer* joined in the cauſe (ſo as it be not joined within ſix weeks after the arreſt or appearance of the defendant). And the practice having been to allow the *habeas corpus*, if delivered before the jury are ſworn, the court refuſed a *procedendo*. *Burr. Rep.* 4 *pt.* 758. but ſee *Pract. Reg. C. P.* 217. *cont.*

Motion for a *procedendo* to a borough court, the *habeas corpus* to remove the cauſe having been brought after interlocutory judgment: and the court of *C. P.* held the *habeas corpus* too late, and made the rule for a *procedendo* abſolute. *Barnes*, 221.

The lord mayor, aldermen, and ſheriffs of *London*, moved to amend their return of defendant's writ of *hab. corp. cum cauſâ*. The ſubſtance of the return was the action between the ſaid parties in debt for the penalty of a *bye-law* brought againſt defendant for employing a *foreigner* (no freeman of the city), and the cuſtom to make *bye-laws*; but the cuſtom to employ freemen, and not foreigners, within the city was omitted; which laſt mentioned cuſtom it was prayed might be inſerted in the return. For defendant, it was ſubmitted, whether the return was amendable or not, eſpecially as another rule touching the granting of a *procedendo* was pending. But the rule to amend the return was made abſolute. *Harriſon, chamberlain of London*, v. *Potter*. *Barnes*, 23.

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of Bail upon ſuch Writ.

IN all caſes where ſpecial bail is required in the court below, if the cauſe is removed by *habeas corpus* either into *B. R.* or *C. B. ſpecial bail* muſt be put in above on the removal, though the debt is under 10*l.* except the defendant is an *heir*, *executor*, or *adminiſtrator*. *Reg. Hil.* 2 *Jac.* 2.

The above is the old rule—but now, by the 19 *Geo.* 3. *c.* 70. as no one can be arreſted or held to *ſpecial bail* in any inferior court, without an affidavit made and filed that the cauſe of action amounts to 10*l.* or upwards; it follows, that where the debt is under 10*l.* and the defendant is not arreſted below, there he would not be obliged upon removal to find *ſpecial bail* above. But to defeat the advantage that might be taken of this, by removing the cauſe in order to delay the plaintiff, the ſame ſtatute provides, that no action in an inferior court, not amounting to 10*l.* or upwards, ſhall be removed by *habeas corpus*, *&c. unleſs the defendant ſhall enter into a recognizance, with two ſureties, in the court below, in double the ſum for which the action is brought*, for payment of the debt and coſts in caſe judgment ſhall paſs againſt him.

An *heir*, *executor*, or *adminiſtrator*, although he has put in *bail below*, ſhall not, upon removal, put in *bail above* to pay the condemnation money; yet he ſhall put in bail above to appear to a new bill or original, within two terms, but not after. But if debt is brought againſt an executor, on a judgment ſuggeſting a *devaſtavit*, he ſhall give bail, for there the action is in the *debet et detinet*. *Vide Salk.* 98. *and* 1 *Lev.* 268. 2 *Lev.* 204.

No bail to be tendered, or put in upon an *habeas corpus*, until the *habeas corpus*, and the cauſe for which bail is to be put in, be returned, to the end that it may appear for what cauſe the defendant is detained, and bail may be taken, and the *habeas corpus* and *bail* duly filed. *Mich.* 1654. *Paſ.* 29 *Car.* 2. *Hil.* 16 *W.* 3.

A defendant who has removed a cauſe from an inferior court into *B. R.* or *C. B.* is not of courſe obliged to put in *ſpecial bail* there; but it lies with the plaintiff to compel him ſo to do. In order therefore to get bail to the action, the plaintiff, immediately as he diſcovers that the cauſe is removed, ſhould take out a rule, or order, from the chambers of one of the judges of the court, for a *procedendo* to remand the cauſe, unleſs good bail be put in within *four days* next after notice of the rule [if in term], or within *ſix days* next after notice of the rule [if in vacation], and then ſerve a copy of ſuch rule or order on the defendant, or his attorney; and unleſs bail be put in accordingly, a *procedendo* may be had.

An

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of Bail upon ſuch Writ.

An action was brought in the ſheriff of *London*'s court againſt *two* partners, one brought an *habeas corpus*, and put in bail for himſelf only. And a *procedendo* being moved for, it was granted: for otherwiſe, the plaintiff would be diſabled to go on in either court. *Fry* v. *Carey*. *Stra*. 527.

Habeas corpus to remove a cauſe out of an inferior court, and on ſearch, plaintiff's attorney found bail; but the *habeas corpus* not being returned and filed, the bail ſiginfied nothing, and therefore he carried the cauſe back by *procedendo*, of which defendant complained to the court; but it was ruled, that the defendant cannot put in bail till the *habeas corpus* be returned. *Maſters* v. *Bruges*. *Mich*. 20 *Car*. 2.

If *common bail* only is neceſſary, the attorney for the defendant fills up a common bail-piece to the *habeas corpus* and return, and files the ſame at the judge's chambers on the return of the rule, and gives notice of having filed the ſame to the plaintiff's attorney.

If *ſpecial bail* is required, the defendant, upon ſervice of the rule for bail engroſſes a bail-piece, and annexes the ſame to the *habeas corpus* and return; and then takes the bail to the judge's clerk, who will take their acknowledgment, to whom is paid in term 6 *s*. 6 *d*. in vacation 7 *s*. 6 *d*. and then notice thereof muſt be given to the plaintiff's attorney.

In *B*. *R*. if bail be taken in the abſence of the plaintiff, or his attorney, the ſame is taken *de bene eſſe*; and if, on due notice in writing of the names and places of abode of ſuch bail, the time when put in, and before whom, no exception thereto be taken by the plaintiff in *twenty-eight days* after the putting them in, the bail-piece ſhall then be filed within *four days* next after the end of the *twenty-eight days*. *Mich*. 16 *Car*. 2.

In *C*. *B*. if bail be taken *de bene eſſe*, and on notice being given of the names and places of abode of the bail, the time when put in, and before whom, no exception thereto be taken in *twenty days*, the bail-piece ſhall be filed within *four days* next after the expiration of the *twenty days*. *Hil*. 13 & 14 *Car*. 2.

And unleſs the bail, in caſe of no exception within time, be not filed within the *four days*, a *procedendo* may be granted upon a certificate that the bail is not filed. *Same rules*.

If the plaintiff diſlikes the bail put in, he ſerves the defendant's attorney with another rule or order for a *procedendo*, unleſs better bail be put in within *four days* after ſervice thereof, whether it be in term or vacation. In term this rule coſts 1 *s*. in vacation 2 *s*.

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of Bail upon ſuch Writ.

If this rule is ſerved in *vacation time*, in *B. R.* the practice is, for the defendant's attorney to give notice only within the rule, that the bail will juſtify on the firſt day of the enſuing term.

But on ſervice of ſuch rule in *vacation time* in *C. B.* it is uſual to juſtify within the four days before a judge at his chambers, for which 2 *s.* is paid; and on the firſt day of the term juſtify in court.

The practice is exactly the ſame as to notices of bail, exception thereto, and juſtifying bail on *habeas corpus*, as in other caſes, for which refer to the firſt vol.

When bail is taken of a priſoner in cuſtody, the judge's clerk in *C. B.* is to deliver the bail to the *prothonotary* to be filed, if aſſented to; and for that purpoſe, the *prothonotary*'s fees are to be depoſited; but the priſoner is not to be diſcharged until the bail be aſſented to, or the plaintiff over-ruled in open court to accept the ſame upon examination. *Mich.* 1654. *Hil.* 13 & 14 *Car.* 2.

If the defendant is an actual priſoner in an inferior court, and brings an *habeas corpus* to remove the action into a ſuperior court, the *habeas corpus* will not diſcharge him out of cuſtody till *bail* is put in above and perfected; therefore it is the better way to gain the defendant his liberty, to put in bail below, and then remove the cauſe into the ſuperior court, if he would have it there determined.

If a cauſe is removed by *habeas corpus* out of the *Marſhalſea*, or other inferior court [*London* excepted], and the bail below offer to be bail above, the plaintiff cannot except to them, but is compellable to take them, becauſe he might but did not except to them below. But it is otherwiſe in a cauſe from *London*, for the ſufficiency of the bail there is at the peril of the clerk, and he is reſponſible to the plaintiff; ſo that the plaintiff has not the liberty of excepting againſt them, and the clerk is not reſponſible if they be deficient in the court above, though he was in *London*. *Salk.* 97.

A cauſe was removed by *habeas corpus*, in vacation time, and the bail put in on the removal ought to have juſtified on the firſt day of the enſuing term [a rule having been ſerved on the defendant for a *procedendo*, unleſs better bail], and the bail not having offered themſelves the firſt day of the term, a *procedendo* was ſued out to remand the cauſe. On the ſecond day of the term the bail came and offered to juſtify, but were then too late; however, a rule was obtained to ſhew cauſe, why the

procedendo

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of Bail upon ſuch Writ.

procedendo ſhould not be ſet aſide: But on ſhewing cauſe the rule was diſcharged, for it was ſaid, that ſhould this rule be made abſolute, it would operate as a ſecond *habeas corpus*, which can never be granted after a cauſe is once remanded by a *procedendo*. *Anon. B. R.* 1778. The counſel offered to pay coſts of the *procedendo*, but nevertheleſs the court diſcharged the rule.

May 20th, 1742, an *habeas corpus*, returnable *immediatè*, was lodged at the *palace court*, to remove a plaint into *C. B.* and nothing further was done in it till 20*th of Nov.* when the plaintiff ſerved the defendant with a rule to put in bail. Defendant inſiſted, that the plaintiff ſhould have ſerved ſuch rule within *two terms* after the *hab. corp.* brought, and was now too late. But the court held, that if the defendant had put in bail upon the *hab. corp.* without ſtaying to be forwarded by a rule for bail; and the plaintiff had not declared within two terms after bail put in, the cauſe would then have been out of court; but the rule for bail is not limited to any particular time: accordingly, the rule to ſhew cauſe why proceedings ſhould not be ſtayed, was diſcharged. *Barnes*, 90.

If one be removed into *B. R.* by *habeas corpus*, and puts in bail, the bail are liable to all other actions, as well as that for which they become bail, at the ſuit of the ſame plaintiff mentioned in the return of the *habeas corpus*, wherein he ſhall declare againſt the ſaid defendant within *two terms* next after: but ſee the next caſe.

The defendant was arreſted by proceſs out of an inferior court, *in a plea of treſpaſs on the caſe*; bail was given, the plaintiff declared, and the cauſe was removed by *habeas corpus*; and then the plaintiff delivered two declarations, one for words, the other upon an *aſſumpſit*. *Per Hale*, If a plaintiff has declared before the *habeas corpus* delivered, the bail ſhall be ſpecial only as to that action, and ſhall be common to the other: but if no declaration before *habeas corpus*, then the bail put in upon the *habeas corpus* ſhall be ſpecial bail to all actions of the plaintiff againſt the defendant of that term; and the plaintiff cannot declare before the *habeas corpus* allowed. *Serle* v. *Newton*, *Hil.* 25, 26 *Car.* 2.

Of

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of Declaring.

IN civil cases, the record itself is never removed by *habeas corpus*, but remains below, therefore the plaintiff must declare *de novo*; and the declaration is exactly the same as in other cases: and if in *B. R.* he is stated to be in *custodia mareschalli. Salk.* 352.

The plaintiff must declare before the end of the second term after the return of the *habeas corpus*, otherwise the defendant is not bound to accept a declaration. And *note*, If the *habeas corpus* is returnable in term, that term is one; and the plaintiff must declare before the end of the succeeding term. Vide *Hutton* v. *Stroubridge. Stra.* 631.

There is no limited time for the plaintiff's getting an order for a *procedendo*, unless bail be put in. *Barnes*, 90.—But if the defendant puts in bail in time, and the plaintiff does not declare in two terms, the cause is out of court.

If a cause is removed by *habeas corpus* out of the courts of *Canterbury*, *Southampton*, *Hull*, *Litchfield*, *Pool*, or other counties where the judges of *nisi prius* seldom go, if the action be transitory, it must be laid in the county of *Kent*, *Hampshire*, *Yorkshire*, *Staffordshire*, or *Dorsetshire*, or other county in which such city or town lies, and the recognizance is to be taken accordingly. *Mich.* 1654.

When a defendant has removed his cause into the superior court, and perfected his bail, he cannot sign a *nonpros*, for want of a declaration, as the plaintiff is not in court till he has declared, and the cause is supposed to be removed against his inclination.

The difference between an *habeas corpus* in a *criminal* and *civil* case, is apparent. For if one be in custody, and indicted for some offence in an inferior court, there must, beside the *habeas corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, the *habeas corpus* alone removes not the record itself; but only the prisoner with the cause of his commitment. And therefore though the court, on the *habeas corpus* and return, can judge of the sufficiency or insufficiency of the return and commitment, and bail, or discharge, or remand the prisoner, yet they cannot upon the bare return give any judgment, or proceed upon the indictment, order, or judgment, without the record itself be removed by *certiorari*; but the same stands in the force it did, though the return be adjudged to be insufficient, and the party discharged of his imprisonment; and the court below may issue new process on the indictment. Whereas an *habeas corpus* in a *civil* case suspends the power of the court below, and if they proceed afterwards, their proceedings are *coram non judice*.

Of

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of Pleading.

IF a cauſe be removed out of *London* or *Middleſex*, the *Marſhalſea*, or any other court within five miles of *London*, in *Hilary* or *Trinity* term, and bail is put in, and the plaintiff declares in *London* or *Middleſex*, and delivers his declaration *ſix days* before the end of the term, the defendant ſhall plead *three days* before the eſſoign day of the ſubſequent term, that the plaintiff may enter the iſſue if he will; but if the plaintiff does not deliver his declaration *ſix days* before the end of the term, the defendant ſhall have an imparlance till the next term. *Vide* 1 *Mod.* 1.

And if a cauſe is removed out of any court, except in *London* or *Middleſex*, the *Marſhalſea*, or other court within five miles of *London*, and the plaintiff does not declare in *London* or *Middleſex*, but in ſome other county, and delivers his declaration at any time before the end of the terms of *Hilary* or *Trinity*, the defendant is bound to plead by the time the rule is out, that the plaintiff may try his cauſe at the aſſizes, if he thinks proper; and for want of a plea in due time, judgment may be entered againſt him.

And if a cauſe is removed by *habeas corpus* returnable in *Michaelmas term*, and the plaintiff declares in *London* or *Middleſex*, and delivers his declaration before *craſtinum animarum*, the defendant muſt plead to trial the ſame term.

So, upon an *habeas corpus* returnable in *Eaſter term*, if the plaintiff declares in *London* or *Middleſex*, and delivers his declaration before *menſem Paſchæ*, the defendant muſt plead to trial the ſame term. *Salk.* 515.

But if the declaration is delivered after theſe reſpective times, and yet *ſix days* before the end of either of theſe terms, the defendant, wherever the action is laid, ſhall plead three days before the eſſoign day of the ſubſequent term; and if not delivered *ſix days* before the end of either of theſe terms, the defendant has an imparlance until the next term.

The above was the practice before the 5 & 6 *Geo.* 2. but by rule made in *B. R. Tr.* 5 & 6 *Geo.* 2. and *Mich.* 3 *Geo.* 2. in *C. B.*

On all proceſs returnable the *firſt* or *ſecond* return [*i. e.* before the *third* return *] of term, if the plaintiff declares in *London* or *Middleſex*, and the defendant lives within twenty miles

* And by *Reg. Tr.* 7 *Geo.* 3. On all proceſs returnable the third return of term.

of

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of Pleading.

of *London*, the declaration may be delivered with notice to plead within *four days* after delivery, and the defendant ſhall plead within that time; and if the plaintiff declares in any other county, or the defendant lives above twenty miles from *London*, the declaration is to be delivered, with notice to plead in *eight days after*; and if the defendant does not plead in that time, a rule to plead having been given and expired, and a demand in writing of a plea having been made, the plaintiff may ſign judgment.

But a declaration muſt be delivered *four days* before the end of term, excluſive of the day of delivery, to have a plea of that term.

Since the making of the above rules, ſome have proceeded upon an *habeas corpus* according thereto, as if upon a *capi corpus*; whilſt others have adhered to the old practice, as to pleading upon an *habeas corpus* before mentioned.

A plea in *abatement* muſt be pleaded within the *four days*, as in other caſes of pleas in abatement. Vide *Pleas in Abatement* in the 1ſt vol.

Debt againſt a *feme ſole* in the palace court, and after appearance and plea pleaded ſhe married, and then removed the cauſe by *habeas corpus:* and after the plaintiff had declared againſt her above, ſhe pleaded her coverture in abatement, *viz.* that ſhe was married at the time the *habeas corpus* ſued out. And it was ruled a good plea, for the proceedings are *de novo*, and the court takes no notice of the proceedings below. But the court ſaid, that if this matter had been moved on the return of the *habeas corpus*, they would have granted a *procedendo:* for though an *habeas corpus* be a writ of right, yet where it is to abate a rightful ſuit, the court may refuſe it. 1 *Salk.* 8.

But coverture, *after* an action brought, cannot abate a plaintiff's writ. *Ld. Raym.* 1525. *Stra.* 811.

Though coverture *before* does, if the action is brought againſt her as a *feme ſole*, and an *habeas corpus* to remove a cauſe is conſidered as the firſt commencement of the action in the court above.

Defendant, *whilſt a feme ſole*, was arreſted in the palace court; and a day or two after the arreſt married, and then removed the plaint by *hab. corp.* into *C. B.* and pleaded her *coverture in abatement.* Whereupon plaintiff obtained a rule to ſhew cauſe why the plea ſhould not be ſet aſide, which, on hearing counſel, was made abſolute. *Barnes*, 355.

An

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of Pleading.

An action was brought in the sheriff's court of *London*, and was removed by *hab. corp.* into *B. R.* the 6th of *Nov.* the first day of *Michaelmas* term. On the twelfth, plaintiff delivered his declaration, and gave a rule to plead: On which, the defendant moved for an *imparlance*, and insisted the practice was the same as if the action was originally commenced in this court, and cited *Salk.* 515. where it was held, that on *hab. corp.* returnable in *Michaelmas term*, if the declaration be delivered before *cras. animarum*, the defendant must plead *to try*; but on a *cepi corpus*, he is only to plead *to enter*.

So in *Easter term*, if the declaration be delivered before *mensem Paschæ*, the defendant, on an *habeas corpus*, must plead *to try*, upon a *cepi corpus* only *to enter*. But the court in the principal case said, We will not put the plaintiff in a worse condition than he was in the court below, and therefore refused an imparlance. 1 *Wilf.* 154.

All subsequent proceedings to the declaration, are the same upon an *habeas corpus* as in other cases.

Of

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of granting a PROCEDENDO.

IT has been ſhewn before, in what caſes the plaintiff is at liberty to remand the cauſe, upon the defendant's not complying, upon removing a ſuit commenced againſt him by *habeas corpus*, with the ſtatutes and rules of court made to regulate the proceedings therein upon ſuch removal—as for *not putting in bail, where ſpecial bail is required*; *not juſtifying bail in due time*, when ſerved with a rule; *not pleading in time to the declaration delivered*, &c.

A *procedendo* is a writ grantable by any judge of the court into which the cauſe was removed, upon application to one of their clerks at chambers. Which, when engroſſed on a two ſhilling ſtamped piece of parchment, muſt be ſigned and ſealed.—The writ is to this effect:

GEORGE the Third, by the grace of God, &c. To the ſheriff of ——— or judges of, &c. [ſtiling the court and judges thereof properly], greeting. Although we lately by our writ commanded you, that you ſhould have the body of *C. D.* detained in our priſon under your cuſtody, as it was ſaid, under ſafe and ſecure conduct, together with the day and cauſe of his being taken and detained, by whatſoever name the ſaid *C.* might be called, in the ſame, before *our right truſty and well-beloved* William *earl of* Mansfield, *our chief juſtice, aſſigned to hold pleas in our court before us*, at his chambers, ſituate in *Serjeant's Inn, Chancery Lane*, immediately after the receipt of that writ, to do and receive all and ſingular thoſe things which our ſaid chief juſtice ſhould then and there conſider of him in that behalf; yet we, being now moved with certain cauſes in our court *before us*, command you and every of you, that in all plaints or ſuits againſt the ſaid *C.* at the ſuit of *A. B.* in our court before you, or any of you levied or affirmed, or before you or any of you now depending undetermined, you proceed with what ſpeed you can in ſuch manner, according to the law and cuſtom of *England*, as you ſhall ſee proper. Our ſaid writ to you thereupon firſt directed to the contrary in any thing notwithſtanding.

Witneſs, &c.

[*Stormont* and *Way*.]

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of granting a PROCEDENDO.

Upon carrying the writ of *procedendo* to the ſecondary of the court to which it is directed, and filing it, the court inſtantly reaſſumes the juriſdiction of the cauſe, which can never afterwards be taken from them again before judgment. And as the writ of *habeas corpus* removes all cauſes that were in the court againſt the defendant, ſo the writ of *procedendo* remands all back again.

Of Audita Querela.

AN *audita querela* is a writ to give relief againſt a judgment or execution awarded, or likely to be awarded againſt the party, by ſetting the ſame aſide upon ſome ground of injuſtice pointed out to the court.

If there is any other remedy at law, either by plea or otherwiſe, an *audita querela* does not lay, except in one or two inſtances, in which the party has his election of this or another remedy.

An *audita querela* is an action, and is in the nature of a bill in equity to be relieved againſt the oppreſſion of the plaintiff. The writ ſtates, that the complaint of the defendant hath been heard *audita querela defendentis*, and then ſetting out the matter of the complaint, it at length enjoins the court to call the parties before them; and having heard the allegations and proofs, to cauſe juſtice to be done between them.

It alſo lies to relieve bail in ſome caſes, and is a writ of a moſt remedial nature; and ſeems to have been invented, leſt in any caſe there ſhould be an oppreſſive defect of juſtice, where a party has a good defence, but by the ordinary forms of law had no opportunity to make it. But the indulgence now ſhewn by the courts in granting a ſummary relief upon * motion, in caſes of evident oppreſſion, has almoſt rendered the writ of *audita querela* uſeleſs, and driven it quite out of practice. However, as there are a few caſes in which this muſt ſtill be the remedy, ſome ſhort account of the proceedings therein cannot be altogether unneceſſary.

Where a party has a matter which he might have pleaded to a *ſcire facias* in his diſcharge, and two *nihils* are returned and judgment againſt him, the court will relieve him upon motion, without putting him to an *audita querela:* but *aliter* in caſe a *ſcire feci* be returned. *Salk.* 93.

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* For it has been held, that relief may be granted on motion in caſes proper for *audita querela*, where it is not grounded on foreign matter, as a releaſe, *&c. Ld. Raym.* 439. *Barnes*, 277.

Out

Out of what Court the Writ iſſues.

AN *audita querela* ſhall be granted out of the court, where the record upon which it is founded remains, or returnable in the ſame court. *F. N. B.* 105. *b.*

And therefore, if a man recovers in *B. R.* or *C. B.* the defendant having a releaſe after judgment and before execution, ſhall ſue the *audita querela* out of *B. R.* or *C. B.* where the record is. *Ibid.*

And if a recognizance is acknowledged, and there is a releaſe of it, and then execution be ſued on it, the party to be relieved ſhall ſue his *audita querela* out of the ſame court. *Ibid.*

And ſuch *audita querela* out of the rolls of the ſame court is *judicial*. *Ibid.*

But it may be *original*, and the party may ſue it out of *Chancery* returnable in the court where the record remains. *Ibid.*

But it cannot be granted out of any court, returnable in the ſame court, where the record upon which it is founded is not there. *Ibid.*

The writ of *audita querela* ſhall be allowed only in open court. 1 *Bulſ.* 140. 2 *Bulſ.* 97. 2 *Show.* 240. And on motion, by *Trin.* 9 *Jac.* 1. And therefore, when the curſitor has written the writ, an *allocatur* ſhall be indorſed by the *ſecondary* in court.

So if it be irregularly granted, a *vacat* ſhall be entered upon the record. *Mo.* 354.

If in a *ſci. fa.* on a judgment, defendant has a releaſe and omits to plead it, he ſhall not have an *audita querela*. *Vide* 1 *Wilſ.* 98.

In an *audita querela* by two, the death of one ſhall not abate the writ, for the ſurvivor is not to be reſtored to any thing he has loſt, but to diſcharge himſelf of the execution; and thereupon, notwithſtanding the death of the other, he may proceed for a diſcharge *in toto* for himſelf. *Vent.* 34. 3 *Mod.* 249.

Of proſecuting an AUDITA QUERELA by the DEFENDANT in the Suit.

IT was ſaid before, that an *audita querela* lies to relieve the defendant after judgment and execution againſt him—and alſo that it lies to relieve *bail* when judgment is had againſt them upon a *ſcire facias* to anſwer the debt of their principal; but as the proceedings in the two caſes ſomewhat differ, I ſhall firſt treat of the *audita querela* by the *defendant* himſelf.

In all caſes it is uſual, that the plaintiff in an *audita querela* be bailed, if he ſhews matter in writing for his diſcharge, and the defendant be demanded whether he can gainſay it. 1 *Rol.* 133. 384. 2 *Rol.* 113. *l.* 5.

If the plaintiff in *audita querela* has a releaſe, or other writing upon which his *audita querela* is founded, the ſame muſt be proved in court by the witneſſes thereto, before the writ of *audita querela* can be allowed, or a *ſuperſedeas* granted. 1 *Sid.* 351. *Salk.* 92.

And then, after proof of ſuch releaſe, *&c.* and allowance of the writ, if he be not in *execution* he may be bailed by the court, and on motion may have a *ſuperſedeas*. *Com. Dig.* 1 *vol.* 489. *Salk.* 92.

But if the plaintiff in *audita querela* be in *execution*, he cannot be bailed till the defendant plead to the *audita querela*. *Comp. Att.* 214.

But where an *infant* was taken in execution, and brought an *audita querela*, he was diſcharged on clearly proving his infancy. *Carth.* 278.

If an *audita querela* be founded on record, or the party be in cuſtody, the proceſs upon the *audita querela*, when allowed, is a *ſcire facias*.—But if the *audita querela* is grounded on a matter *of fact*, or the party be not in cuſtody, but only brought *quia timet*, the proceſs on the *audita querela*, when allowed, *&c.* is a *venire facias*; and on default thereto, a *diſtringas ad infinitum*. *Salk.* 92.

If brought by one in *execution*, the *ſcire facias* is the proceſs. *Carth.* 303.

An *audita querela* is no *ſuperſedeas* of itſelf, and therefore execution may be taken out, unleſs a *ſuperſedeas* be actually ſued upon the allowance of the writ of *audita querela*. *Salk.* 92.

If the firſt writ of *audita querela* abate, upon a ſecond purchaſed, he may have another *ſuperſedeas*. *F. N. B.* 104. *r.*

If one in execution is admitted to bail upon bringing an *audita querela*, he muſt procure four perſons to be bail for him. The bail-piece is in the following form:

Eaſter

Of proſecuting an AUDITA QUERELA by the DEFENDANT in the Suit.

Eaſter term, in the twentieth year of king *George* the Third.

To wit, *C. D.* of, *&c.* is delivered on bail to proſecute, with effect, a writ of *audita querela* brought by him to be diſcharged of and from a judgment given againſt him in the court of our lord the king, *before the king himſelf*, at the ſuit of one *A. B.* for five hundred pounds of debt, and for damages, coſts, and charges, to

E. F. of, *&c.* ——
G. H. of, *&c.* ——
N. O. attorney. *I. K.* of, *&c.* ——
and
L. M. of, *&c.* ——

The condition of the recognizance.

YOU ſeverally acknowledge yourſelves to owe *A. B.* the ſum of one thouſand pounds—

Upon condition that the ſaid *C. D.* ſhall proſecute his ſuit with effect, and if he ſhall be convicted or make default in the premiſes, that he ſhall pay the condemnation-money, or you ſhall do it for him.

Are you content?

An *audita querela* lies not after judgment upon a matter which might have been pleaded before; but where the party was condemned, and had no day in court to plead it, an *audita querela* lies. *Cro. El.* 25.

As if a releaſe be given after the day of *niſi prius*, and before the day in bank, the defendant cannot plead it, becauſe there is a verdict already in the cauſe, and upon another plea; and therefore the cauſe is already determined, ſo that he is put to his *audita querela* to hinder the execution of the judgment. 2 *Lutw.* 1143. 1174.

If on a judgment and a writ of error brought, the plaintiff in the original action brings debt on the judgment, and recovers a judgment thereon, and afterwards the firſt judgment is

Of proſecuting an AUDITA QUERELA by the DEFENDANT in the Suit.

reverſed on the writ of error, an *audita querela* may be brought for relief againſt the ſecond judgment.

So, if an action be brought againſt *A.* for a treſpaſs committed *ſimul cum B.* and judgment be obtained thereupon, and afterwards the plaintiff releaſe *B.*—*A.* may have an *audita querela* on the releaſe.

But if a *ſcire facias* was brought on a judgment, and the defendant has a releaſe, and omits to plead it to the *ſcire facias*, he ſhall not have an *audita querela.*

Where a defendant had matter which might have been pleaded to a *ſci. fa.* and has loſt the benefit of that by an award of execution upon a *ſcire feci* returned, he is eſtopped for ever, and can never have an opportunity to take advantage thereof again: but if it was an award of execution upon two *nihils* returned, he may be relieved by bringing an *audita querela:* And the court will not even drive him to that, but relieve him on motion, unleſs the ground of his *audita querela* be a releaſe, or ſome ſuch foreign matter, which ought to be pleaded.

Judgment on *ſcire facias, error coram vobis reſiden.* brought, and the aſſignment of error was a matter of fact, contrary to the ſuggeſtion of the *ſci. fa.* Iſſue was taken and found for plaintiff in error; and it was then moved, that the judgment might be reverſed. *Per Holt et Cur.* Error will not lie in this caſe, but an *audita querela* only; becauſe the fact aſſigned for error is in the ſuggeſtion of the writ itſelf, and not in any of the proceedings in the cauſe. *Carth.* 282.

If one be taken in execution, and afterwards ſet at liberty by the plaintiff, and then taken again upon the ſame execution, he may bring his *audita querela* to be enlarged, for the execution was diſcharged; and being once diſcharged, is diſcharged for ever, and ſuppoſes a ſatisfaction.

Judgment for 500*l.* againſt the anceſtor who pays it, and dies, not having taken a releaſe or deed upon the payment. Reſolved, that the heir may maintain an *audita querela* upon this payment, though no deed or ſpecialty. 2 *Keb.* 455.

An adminiſtrator recovered in trover, counting of his own poſſeſſion after adminiſtration committed; but before execution the adminiſtration was revoked, and the defendant brought *audita querela*, and adjudged it lay. For though of goods in his own poſſeſſion he had no need to name himſelf adminiſtrator, yet the goods here are aſſets, and he is chargeable as executor *de ſon tort*, after adminiſtration repealed for the goods ſo taken in

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in execution.—So, where baron and *feme* executrix recover, and the *feme* dies before execution, the baron ſhall not have *ſcire facias*. Vide 2 *Keb.* 668. *Cro. Car.* 208. 227. 464.

The plaintiff had a verdict in treſpaſs againſt two, and after the day at *niſi prius*, and before the day in bank, in conſideration of 10 *l.* releaſed to one of the defendants.—On which the other defendant, after the day in bank, but before judgment entered, to take advantage of the releaſe, ſued out an *audita querela*, put in bail, and declared as of the judgment entered.—The plaintiff in the original action to the declaration in *audita querela* pleaded *nul tiel record*, on which plea the plaintiff in *audita querela* moved, that the plaintiff in the original action might bring in the *poſtea* and enter the judgment, or that he ſhould do it for him. *Per Cur.* Let the plaintiff in the original action enter his judgment within ſuch a time as of the day in bank, or let it never be entered, and let the ſuit on the *audita querela* ſtay. *Ranſere* v. *Meredith* and *Baker*. *Poſ.* 26 *Car.* 2. 1 *Mod.* 111.

The plaintiff, a *feme ſole*, married after the interlocutory judgment, and before executing the writ of enquiry; and it was now moved to ſet aſide the writ of enquiry, and the inquiſition thereon taken. But refuſed by the court. And the defendant was left to his *audita querela*. *Bunb.* 283.

The plaintiff, a *feme ſole*, between interlocutory and before final judgment, married; and after the final judgment, the *huſband and wife* brought a *ſcire facias* thereupon, for the defendant to ſhew cauſe *quare ex. non, &c.* And then the defendant moved to have the judgment ſet aſide; but the court refuſed to do it on motion, and put him to his *audita querela*. *Bunb.* 282.

One lent money, and for ſecurity accepted a judgment; the money was paid within a day or two after it became due, and the party gave an acquittance, and promiſed to acknowledge ſatisfaction, and this was proved before the ſecondary; yet the plaintiff took the defendant in execution, and he remains in priſon. *Per Cur.* The proper remedy is by *audita querela*; but let the plaintiff appear here next term, to ſhew cauſe why he ſhould not acknowledge ſatisfaction on record. *Anon. Mich.* 29 *Car.* 2.

If two executors ſue execution for damages recovered by the teſtator, where one hath releaſed, an *audita querela* lies againſt both. *Rol. Abr.* 312.

Of profecuting an AUDITA QUERELA by the DEFENDANT in the Suit.

If *A.* hath judgment againſt *B.* for coſts and damages, and releaſes to *B.* all executions, and after *B.* brings a writ of error, and thereupon the judgment is affirmed, and further coſts given for the delay of execution, and *A.* takes *B.* in execution for the whole, upon an *audita querela* *B.* ſhall be diſcharged *quoad* the damages and firſt coſts, but not *quoad* the ſecond coſts. *Cro. Jac.* 337. *Rol. Rep.* 11.

If two are bound in an obligation, *jointly and ſeverally*, and judgment is given againſt each in two ſeveral actions, one in *banco*, the other in *banco regis*, and after one is taken in execution in *banco regis*, and then an execution is taken in *banco* againſt the other by *elegit*, and lands and goods delivered in execution thereupon; he that is in execution by his body in *banco regis*, ſhall be delivered upon an *audita querela*, becauſe the execution upon an *elegit* is a ſatisfaction. *Hob.* 2. *Cro. Jac.* 338. 2 *Bulſ.* 97. *Godb.* 257. *Rol. Rep.* 8, 9.

But if *A.* and *B.* are bound in an obligation, *jointly and ſeverally*, and judgment given againſt each upon ſeveral actions brought, and both taken in execution, and after *A.* eſcapes, yet *B.* ſhall not be delivered upon an *audita querela*; for though the obligee may have an action againſt the ſheriff for an eſcape, yet, till he is actually ſatisfied, the other ſhall not have an *audita querela*; nor the obligee be compelled, whether he will or no, to take his remedy againſt the ſheriff, who may die or be inſolvent. *Vide Bac. Abr.* 3 *Vol.* 699, &c.

Of

Of proſecuting an AUDITA QUERELA by the BAIL to the original Suit.

WHEN bail bring *audita querela* to be relieved from a judgment or execution had againſt them to anſwer the debt of their principal; and the writ of *audita querela* is allowed, they have no occaſion to put in bail, unleſs the bail are in execution.

Where judgment is had againſt bail upon a *ſcire facias* upon default of their principal, and afterwards the original judgment is reverſed, bail may be relieved by *audita querela*, for they have no other remedy, having no opportunity to plead it. 1 *Rol. Abr.* 308.

Judgment in debt againſt *H.* who died, not having ſatisfied the debt or rendered his body, a *ſcire facias* iſſued againſt the bail; and after two *nihils*, execution was awarded, whereupon they brought an *audita querela*; and becauſe no *ca. ſa.* had been awarded againſt *H.* they had judgment. *Cro. El.* 597.

The *exoneretur* which had been ordered to be entered by the court was not actually entered on the bail-piece [by the omiſſion of the proper officer]. But the plaintiff himſelf was apprized of the ſurrender; though the attorney ſwore, that he, the attorney, had no notice of it.—The plaintiff's attorney not being apprized of the ſurrender of the principal, ſued out *ſcire facias's* againſt the bail, who paid the money; but they were ſued into *London*, where the original cauſe of action was, and not into *Middleſex*, where the ſurrender was made, and where the bail-piece remained. Upon both theſe irregularities, *viz.* the plaintiff's being apprized of the *ſurrender* and order of the court; and 2*dly*, The *ſcire facias's* being ſued out into *London*, inſtead of *Middleſex*, it was moved, that the *ſcire facias's* might be ſet aſide for irregularity, with coſts, and the money reſtored. —The court were clear as to both points, and made the rule abſolute for ſetting the *ſcire facias's* aſide, and reſtoring the money, but without *coſts*, as awarding coſts would have been to no purpoſe;—the plaintiff, who was apprized of the ſurrender, being gone abroad; and the attorney, who was not apprized, not having acted with any deſign to oppreſs. *Bond* v. *Iſaac. Burr. Rep.* 4*pt.* 409.

Of the Proceſs in Audita Querela.

IT was ſaid before, that the *proceſs* upon an *audita querela* is of two ſorts, *viz.* a *ſcire facias* and a *venire facias*.

The proceſs of *ſcire facias* is proper when the party ſuing the *audita querela* is in actual cuſtody, or when the writ itſelf is founded on record.

The proceſs of *venire facias* is proper when the party is not in cuſtody, but only brings his *audita querela quia timet*, or when the writ itſelf is grounded on a matter of fact. *Salk.* 92. *Carth.* 303.

If the original ſuit were by *original writ*, there ſhould be *fifteen days* at leaſt between the *teſte* and *return* of the proceſs iſſued upon the allowance of the *audita querela*, and muſt be returnable on a *general return*.

But if the original ſuit were by *bill* (it ſeems), that *fifteen days* between the *teſte* of the firſt *ſcire facias*, and *return* of the ſecond *ſcire facias*, are ſufficient.—*i. e.* Seven days between the *teſte* and *return* of each writ, and not one ten, and the other five.

And the writ ſhould be returnable on a day certain in term.

But even if the original ſuit were by *bill*, and the proceſs on the *audita querela* be a *venire facias*, I ſhould apprehend that there ought to be *fifteeen days* between the *teſte* and *return* of that writ; becauſe the ſecond proceſs iſſuing upon default thereto, is a *diſtringas*.

The defendant in the *audita querela* ſhould be warned to appear.

A. being taken in execution, brought an *audita querela*, teſted 21*ſt Nov.* a *ſcire facias* iſſued and bore *teſte* the 6*th Nov.* The defendant appeared and demurred, and ſhewed for cauſe, that the *teſte* of the *ſcire facias* was before the *audita querela*. *Sed non allocatur*, for here the *ſcire facias* being but to compel the party to appear, and anſwer the *audita querela*, the appearance has helped the defect of the proceſs; but upon a *ſcire facias* upon a judgment it may be otherwiſe, becauſe another judgment is to be grounded upon it. *Vaughan* v. *Lloyd*, *Hil.* 20, 21 *Car.* 2.

Of Declaring, &c. in Audita Querela.

IF the defendant in *audita querela* appears upon the *ſcire facias*, *venire facias*, or *diſtringas*, the plaintiff in *audita querela* declares; in which declaration the whole writ of *audita querela* is recited in the ſame manner as in a declaration in *ſcire facias*, with a beginning to this effect:

" OUR lord the king ſent to his juſtices, * *aſſigned to hold pleas before the king himſelf*; his writ cloſe in theſe words, to wit, *George* the Third, *&c.*" (and ſo recite the whole writ of *audita querela.*)

In the declaration in an *audita querela*, the better form is to recite the whole record of the recovery, or it may be recited generally, as " *Quod cum quidam* A. *nuper ſcilicet*, *&c. implacitaſſet quendam* B. *&c. ſuper quo* he found bail, *taliterque in eâdem curiâ noſtrâ proceſſum fuit, quod prædictus* A. *recuperet*, *&c.*" *Co. Ent.* 87. *b. c.*

But if there is a variance between the *audita querela* and the record, the writ abates. *F. N. B.* 104. *r.*

The declaration ought to comprehend only one *gravamen*, or at leaſt, if it mentions ſeveral, it ought to rely upon one only, otherwiſe it will be double. *F. N. B.* 104. *r. Cro. El.* 809. *Dy.* 297. *b.* And the plaintiff ought to ſhew himſelf aggrieved. *Ibid.*

In the entry of the declaration, after the writ of *audita querela* is ſet forth, the plaintiff ſuggeſts the *gravamen*, and prays to be diſcharged, *&c.* Afterwards is ſet out the award of the *ſcire facias* or *venire*, *&c.* and the recognizance of bail (if the plaintiff was in execution and delivered on bail), then the return to the *ſcire facias*, or *venire*, and the defendant's appearance.

If the defendant confeſſes the matter alledged, the plaintiff has judgment and diſcharge by confeſſion; but if the defendant denies it, the parties proceed to iſſue in fact, or in law, as in other caſes.

No damages or coſts can be given to a plaintiff in an *audita querela*. *See Dyer*, 194.

If the plaintiff in *audita querela* be nonſuited, though he may have a new writ of *audita querela*, he ſhall have no *ſuperſedeas* to ſtay execution.

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* This is the form of beginning in *B. R.* In *C. B* the form is thus, " OUR lord the king ſent to his juſtices of the *Bench*," *&c.*

If

Of Declaring, &c. in Audita Querela.

If the *audita querela* be brought while the money recovered on the firſt judgment remains in the hands of the ſheriff, and not paid over to the party, the court will make an order for it to remain there till the *audita querela* is determined. But it ſeems, that if the money on the firſt judgment is paid over to the party recovering it, there is no remedy for it.

But by *Windham*, juſt. Where judgment is had in an *audita querela* brought before the former execution done, the plaintiff in *audita querela* ſhall be reſtored to whatever he loſt by the execution, which the court agreed, being founded on a releaſe. *Vide* 1 *Keb.* 260. 245. 1 *Sid.* 74.

Of

Of the Judgment in Audita Querela.

BY the proceſs of *venire facias*, the plaintiff in *audita querela* may have diſtreſs infinite till the defendant appears.—But if the defendant does not appear and plead after a *ſcire facias*, and two *nihils* returned, there ſhall be judgment againſt him.

But if there is judgment after one *nihil*, it is error. *R. Yelv.* 88.

If the defendant pleads, and afterwards makes default upon the *ſcire facias ad audiendum judicium*, there ſhall be judgment againſt him.

If there be judgment for the defendant in an *audita querela*, before he have execution upon his firſt judgment, he may afterwards purſue his execution upon that. 1 *Vent.* 264.

If the defendant in the firſt judgment was in execution before the *audita querela*, and in that there is judgment for the defendant, he ſhall purſue judgment in the *audita querela*. 1 *Vent.* 264.

Of Amendments and Jeofails.

Of Amendments.

BY the 14 *Edw.* 3. *ſtat.* 1. *c.* 6. it is enacted, "That by the *miſpriſion* of a clerk in any place, whereſoever it be, no proceſs ſhall be annulled or diſcontinued, by miſtaking in writing one ſyllable or one letter too much or too little, but as ſoon as the thing is perceived, by challenge of the party, or in other manner, it ſhall be haſtily amended in due form, without giving advantage to the party that challengeth the ſame becauſe of ſuch miſpriſion."

By the 8 *Hen.* 6. *c.* 12. "No judgment nor record ſhall be reverſed nor annulled for any error aſſigned in any record, proceſs, warrant of attorney, original writ, or judicial, panel or return, in any places of the ſame raſed or interlined, or in any addition, ſubſtraction, or diminution of words, letters, titles, or parcels of letters, found in any record, proceſs, warrant of attorney, writ, panel, or return certified."

"The judges of the courts in which any record, proceſs, word, plea, warrant of attorney, writ, panel, or return be, ſhall have power to examine the ſame, and to reform and amend (in affirmance of the judgments of ſuch records and proceſſes) all that which to them in their diſcretion ſeemeth to be miſpriſion of clerks; *except appeals, indictments of treaſon and of felonies, and outlawries of the ſame; and the ſubſtance of proper names, ſurnames, and additions left out in original writs, and writs of exigent*; ſo that by ſuch miſpriſion of clerks no judgment ſhall be reverſed nor annulled; and if any ſuch record, proceſs, *&c.* be certified defective, the party in affirmance of the judgment may alledge, that the ſame writing is variant from the ſaid certificate, and that being found and certified, the ſame variance ſhall be reformed and amended according to the firſt writing."

The above are ſaid to be the only ſtatutes of *amendments*; the ſtatutes of *jeofails* are more numerous and intricate; but of them in their order,

Of

Of Jeofails.

BY the ſtat. 9 *Hen.* 5. *c.* 4. in explanation of the 14 *Edw.* 3. ordains, "That the juſtices before whom ſuch plea or record is made, or ſhall be depending, as well by adjournment, as by way of error, or otherwiſe, ſhall have power to amend ſuch record and proceſs, *&c.* as well *after*, as *before* judgment given in any ſuch plea or record."

The 4 *Hen.* 6. *c.* 3. confirms the ſtatutes 14 *Edw.* 3. and the 9*th of Hen.* 5. and extends the power thereby given to amend, "as well after judgment given upon a *verdict* paſſed, as upon a *matter in law* pleaded."

The 8 *of Hen.* 6. *c.* 15. authorizes "the amendments for defaults and miſpriſions of clerks, officers, *&c.* according to the diſcretion of the juſtices, and by examination thereof by them to be taken where they ſhall think needful; but not to extend to records or proceſſes in *Wales*, or records or proceſſes of outlawries of felonies and treaſons, and the dependencies thereof."

The 32 *of Hen.* 8. *c.* 30. enacts, "That *if any iſſue be tried by the oath of twelve or more indifferent men*, for the party plaintiff or demandant, or for the party of the tenant or defendant, in any action or ſuit at common law in any court of record, that then the juſtices by whom judgment thereof ought to be given, ſhall proceed and give judgment in the ſame, any miſpleading, lack of colour, inſufficient pleading or jeofail, or any miſcontinuance or diſcontinuance, or miſconveying of proceſs, misjoining of the iſſue, lack of warrant of attorney for the party againſt whom the ſame iſſue ſhall happen to be tried, or any other default or negligence of any of the parties, their counſellors or attornies had or made to the contrary notwithſtanding; and the ſaid judgments thereof, ſo to be had and given, ſhall ſtand in full ſtrength and force to all intents and purpoſes, according to the ſaid verdict, without any reverſal or undoing of the ſame by writ of error or falſe judgments, in like form as though no ſuch default or negligence had ever been had or committed."

The 18 *of Eliz. c* 14. enacts, "*That if any verdict of twelve men, or more, ſhall be hereafter given* in any action, ſuit, bill, plaint or demand, in any court of record, the judgment thereupon ſhall not be ſtayed or reverſed by reaſon of any default in form, or lack of form, touching falſe *Latin*, or variance from the regiſter, or other defaults in form in any writ original or judicial, or by reaſon of any imperfect or inſufficient return of any ſheriff or other officer, or for want of any warrant of attorney, or by reaſon of any manner of default in proceſs, upon or after any *aid prier or voucher*, nor any ſuch record

Of Jeofails.

record of judgment after verdict to be given hereafter, ſhall be reverſed for any the defects or cauſes aforeſaid—provided that the ſaid act ſhall not extend to any writ, declaration, or ſuit of appeal of felony or murder, nor to any indictment or preſentment of felony, murder, treaſon, or other matter, nor to any proceſs on any of them, nor to any writ, bill, action, or information upon any popular or penal ſtatute."

The 21 *Jac.* 1. *c.* 13. enacts, "*That if any verdict of twelve men or more ſhall hereafter be given* for the plaintiff or demandant, or for the defendant or tenant, bailiff in aſſize, vouchee, pray in aid, or tenant by receipt, in any action, ſuit, bill, plaint, or demand in any court of record, the judgment thereupon ſhall not be ſtayed or reverſed by reaſon of any variance in form only, between the original writ or bill, and the declaration, plaint, or demand, or for lack of any averment of any life or lives of any perſon or perſons, ſo as upon examination the ſaid perſon be proved to be in life; or by reaſon that the *venire facias*, *habeas corpora*, or *diſtringas*, is awarded to a wrong officer, upon any inſufficient ſuggeſtion, or by reaſon the *viſne* is in ſome part miſawarded, or ſued out of more places, or of fewer places, than it ought to be, ſo as ſome one place be right named; or by reaſon that any of the jury which tried the ſaid iſſue is miſnamed, either in the ſurname or addition in any of the ſaid writs, or in any return upon any of the ſaid writs, ſo as upon examination it be proved to be the ſame man that was meant to be returned; or by reaſon that there is no return upon any of the ſaid writs, ſo as a panel of the names of jurors be returned and annexed to the ſaid writ; or for that the ſheriff's name, or other officer's name having the return thereof is not ſet to the return of any ſuch writ, ſo as upon examination it be proved that the ſaid writ was returned by the ſheriff, or under ſheriff, or any ſuch other officer; or by reaſon that the plaintiff in an *ejectione firmæ*, or in any perſonal action or ſuit, being an infant under the age of one-and-twenty years, did appear by attorney therein, and the verdict paſs for him——provided that the ſaid act ſhall not extend to any writ, declaration, or ſuit of appeal of felony or murder, nor to any indictment or preſentment of felony, murder, or treaſon; nor to any proceſs upon any of them; nor to any writ, bill, action, or information upon any popular or penal ſtatute."

The 16 & 17 *Car.* 2. *c.* 8. (called by Twyſden the omnipotent act), enacts, "*That if any verdict of twelve men* ſhall be given in any action, ſuit, bill or demand, in any of his majeſty's *courts of record* at *Weſtminſter*, or in the counties palatine of *Cheſter*,

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ter, *Lancaſter*, or *Durham*, or in his majeſty's courts of the great ſeſſions in *Wales*, judgment thereupon ſhall not be ſtayed or reverſed, for default in form or lack of form; or by reaſon that there are not pledges, or but one pledge to proſecute, returned upon the original writ; or becauſe the name of the ſheriff is not returned upon ſuch original writ, or for default of entering pledges upon any bill or declaration; or for default of alledging the bringing into court of any bond, bill, indenture, or other deed, mentioned in the declaration, or other pleading; or for default of allegation of the bringing into court letters teſtamentary or letters of adminiſtration; or by reaſon of the omiſſion of *vi & armis*, or *contra pacem*; or for or by reaſon of the miſtaking of the Chriſtian name or ſurname of the plaintiff or defendant, demandant or tenant, ſum or ſums of money, day, month, or year, by the clerk, in any bill, declaration, or pleading, where the right name, ſurname, ſum, day, month or year, in any writ, plaint, roll, or record, preceding, or in the ſame roll or record where the miſtake is committed, is or are once truly and rightly alledged, whereunto the plaintiff might have demurred, and ſhewn the ſame for cauſe; nor for want of the averment of *hoc paratus eſt verificare*; or for *hoc paratus eſt verificare per recordum*; or for not alledging *prout patet per recordum*; or for that there is no right *venue*, ſo as the cauſe were tried by a jury of the proper county or place where the action is laid; nor any judgment after verdict, confeſſion by *cognovit actionem*, or *relicta verificatione*, ſhall be reverſed for want of *miſericordia* or *capiatur*; or by reaſon that a *capiatur* is entered for a *miſericordia*, or a *miſericordia* for a *capiatur*; nor for that *ideo conceſſum eſt per curiam* is entered for *ideo conſideratum eſt per curiam*; nor for that the increaſe of coſts after a verdict in any action, or upon a nonſuit in replevin, are not entered to be at the requeſt of the party for whom judgment is given; nor by reaſon that the coſts in any judgment are not entered to be by conſent of the plaintiff; but that all ſuch omiſſions, variances, defects, and all other matters of like nature, not being againſt the right of the matter of the ſuit, nor whereby the iſſue or trial are altered, ſhall be amended by the juſtices, or other judges of the courts where ſuch judgments are or ſhall be given, or whereunto the record is or ſhall be removed by writ of error——not to extend to appeal of felony or murder, nor to any indictment or preſentment of felony, murder, treaſon, or other matter; nor to any writ, bill, action or information upon any penal ſtatute, other than concerning cuſtoms and ſubſidies of tonnage and poundage."

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The ſtat. 4 & 5 *Anne*, *c.* 16. enacts, "That where any *demurrer* ſhall be joined and entered in any action or ſuit in any court of record, the judges ſhall proceed and give judgment, according as the very right of the cauſe and matter in law ſhall appear unto them, without regarding any imperfection, omiſſion, or defect in any writ, return, plaint, declaration, or other pleading, proceſs, or courſe of proceeding whatſoever, except thoſe only which the party demurring ſhall ſpecially and particularly ſet down and expreſs, together with his demurrer, as cauſes of the ſame, notwithſtanding that ſuch imperfection, omiſſion, or defect, might have been taken to be matter of ſubſtance, and not aided by the ſtatute made in the twenty-ſeventh year of queen *Elizabeth*, *&c.* ſo as ſufficient matter appear in the ſaid pleadings upon which the court may give judgment, according to the very right of the cauſe; and therefore no advantage or exception ſhall be taken of or for an immaterial traverſe; or of or for default of entering pledges upon any bill or declaration; or of or for the default of alledging the bringing into court any bond, bill, indenture, or other deed mentioned in the declaration or other pleadings; or of or for the default of alledging the bringing into court letters teſtamentary or letters of adminiſtration; or of or for the omiſſion of *vi & armis* and *contra pacem*, or either of them; or of or for the want of averment of *hoc paratus eſt verificare*, or *hoc paratus eſt verificare per recordum*; or of or for not alledging *prout patet per recordum*; but the court ſhall give judgment according to the very right of the cauſe as aforeſaid, without regarding any ſuch imperfections, omiſſions, and defects, or any other matter of like nature, except the ſame ſhall be ſpecially and particularly ſet down and ſhewn for *cauſe* of *demurrer*."

And that all the ſtatutes of jeofails ſhall be extended to judgments entered upon confeſſion, *nil dicit*, or *non ſum informatus*, in any court of record; and no ſuch judgment ſhall be reverſed, nor any judgment upon any writ of enquiry of damages executed thereon, ſhall be ſtayed or reverſed, for or by reaſon of any imperfection, omiſſion, defect, matter or thing, which would have been aided and cured by any of the ſaid ſtatutes of jeofails, in caſe a verdict of twelve men had been given in the ſaid action or ſuit, ſo as there be an original writ or bill, and warrants of attorney duly filed.

By the ſtat. 9 *Anne*, *c.* 20. "All the ſtatutes of jeofails are extended to all writs of *mandamus*, and *informations*, in the nature of *quo warranto*."

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By the 5 *Geo.* 1. *c.* 13. "All writs of *error*, wherein there ſhall be any variance from the original record, or other defect, may and ſhall be amended and made agreeable to ſuch record, by the reſpective courts where ſuch writ or writs of error ſhall be made returnable; and that where any verdict hath been or ſhall be given in any action, ſuit, bill, plaint or demand, in any of his majeſty's courts of record, or within England or Wales, the judgment thereupon ſhall not be ſtayed or reverſed for any defect or fault, either in form or ſubſtance in any bill, writ original or judicial, or for any variance in ſuch writs from the declaration or other proceedings"—not to extend to any appeal of felony or murder, or to any proceſs upon any indictment, preſentment, or information of or for any offence or miſdemeanour whatſoever.

It is to be obſerved, that the above ſtatutes neither extend to *criminal proceedings* nor to *penal actions*.

Though the ſtatute 14 *Edw.* 3. ſeems only to have authorized an amendment where there was only a *ſyllable* or *letter* too much or too little in *proceſs*, yet the judges conſtrued it to extend to the amendment of a word. But as it was confined to *proceſſes*, they doubted whether they could make amendments thereof as well after judgment as before, and therefore confined it only to the amendment of *meſne* and *jury* proceſs; which occaſioned the ſtatutes 9 *of Hen.* 5. *c.* 4. and the 4 *of Hen.* 6. *c.* 3. by which ſuch power is given them as long as the record or proceſs is before them, as well after judgment as before, whether it be a judgment upon a *verdict*, or on *demurrer*.

The ſtatute 8 *of Hen.* 6. *c.* 12 *and* 15. greatly enlarged the authority of the courts; but as thoſe ſtatutes extended only to what the judges ſhould interpret the *miſpriſions* of their clerks, and of ſheriffs, coroners, and other officers, it was found that many juſt cauſes were overthrown for want of *form* (not aided by any of the foregoing ſtatutes), though they were good in *ſubſtance*. This defect occaſioned the ſtatute 32 *of Hen.* 8. *c.* 30. which though much more extenſive than any preceding it, in allowing the judges to overlook or amend various *miſtakes*, yet it remedied no *omiſſion* but one, *viz.* the party's negligence againſt whom the iſſue was found, in not filing his warrant of attorney, which ſhould not *after verdict* prejudice the right of the party that had prevailed.

The ſame ſtatute, ſince it extended only to the overlooking or amending of defects *after a verdict given on an iſſue tried by a jury* for the plaintiff or demandant, tenant or defendant, was defective in the following among other reſpects.

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If in replevin the plaintiff is *nonſuit* after evidence, and the jury aſſeſſed damages for the avowant, this is no trial within the act, for it is only in nature of an inqueſt of office. *Cro. Jac.* 359.

Neither an iſſue upon *nul tiel* record, 11 *Co.* 3. nor between the demandant and *vouchee*, are within the act. 11 *Co.* 6.

If as to part the defendant joins iſſue, but ſays nothing to the reſt, and this iſſue be found for plaintiff, he ſhall have judgment—but if pleaded to the whole, it is a bad plea, and not helped by the ſtatute. *Hard.* 331.

But the ſtatute extends to diſcontinuance on the part of the plaintiff, as well as thoſe on the part of the defendant, and to thoſe after as well as before verdict. *Cro. Jac.* 528.

Miſconveying (or miſconceiving) of proceſs within the act, means, as if a *diſtringas* be awarded where it ſhould be an *hab. corp.* But it is otherwiſe if a *venire* (or other proceſs) be awarded to a wrong officer. *Savil.* 37. *Yelv.* 15.

If the judgment be not given upon the *verdict*, it is not within the act; as in debt againſt an heir who pleads *riens per deſcent*, except 20 acres in *D.* upon which iſſue is joined, and verdict for the defendant. If the plaintiff take judgment upon the confeſſion, it may be reverſed by reaſon of a diſcontinuance. *Yelv.* 169.

As the foregoing ſtatute cured only the party's *warrant of attorney*, againſt whom the iſſue was found, the 18 *of Eliz. c.* 14. cures, amongſt other defects, the want of *any* warrant of attorney, and remedies omiſſions which the prevailing party might have been guilty of, as well as the other ſide.

This laſt ſtatute, after *verdict* given, cures the want of form in various inſtances; and amongſt others it cures the want of any writ *original* or *judicial*. But if there was a *vicious* writ, and the proceedings were had on ſuch writ, it is not cured—So an ill writ in ſubſtance, or a good writ which warrants not the declaration, is not aided by this ſtatute.—But the want of a *bill* on the file, which is in nature of an original, is aided by the equity of the act. *Cro. El.* 722. The want of a *venire*, *diſtringas*, or the like, is aided, but not a vicious one.

If there be no return, or the writ be *album breve*, this was not aided by this act. *Yelv.* 110. and if one ſheriff of *London* made a return without the other, it was not helped, being no return at all; for they make but one officer, and the court knows, that in one ſheriff there, there is two perſons.

All theſe ſtatutes before noticed were extended only to the courts above; but the ſubſequent ſtatutes thereto extend to all courts

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courts of *record*, and remedy ſeveral defects and omiſſions not included in the former. 2 *Saund.* 258.

The firſt of theſe ſubſequent ſtatutes is the 21 *Jac.* 1. *c.* 13. which aids many things before omitted, after *verdict* either for plaintiff or demandant, defendant or tenant, in any court of record—ſuch as variance *in form* between original or bill, and the declaration, *&c.*—the want of averment of a perſon being in life—the awarding of jury proceſs to a wrong officer—the miſawarding of *venue*—miſnomers of jurymen—the want of a return upon jury proceſs—the want of the ſheriff or other officer's name to the return of ſuch writ—and the party's appearing by attorney (being under age), in ejectment or other action.

There were but 24 returned upon the panel annexed to the *venire facias*, but there were 48 upon the *hab. corp.* upon which defendant made no defence.—On motion the verdict was ſet aſide without coſts, the court ſaying, that this ſtat. 21 *Jac.* 1. means only the formal words upon the writ, for there muſt be a panel annexed to the return.—*Browne and Johnſton. C. B. Tr.* 11 *Geo.* 2.

The main deſign of the above ſtatute was to help any miſtake in the *jury proceſs*; but as there were ſeveral things ſtill to be ſupplied, and ſeveral matters to be adjudged *form*, which were always conſtrued to be matter of *ſubſtance*, and which conſequently were not aided by any of the foregoing ſtatutes, the 16 & 17 *Car.* 2. was made, and afterwards perpetuated by the 22 & 23 *Car.* 2. *c.* 4. which cures, after *verdict* had in the courts of record therein mentioned, ſeveral defects and other matters (theretofore matters of *ſubſtance*) to which the plaintiff might have *demurred*, and ſhewn the ſame for cauſe—or for that there is no right *venue*, ſo as the trial was by a jury of the *proper* county or place.

This ſtatute not only cures the matters therein ſtated after a *verdict* had, but alſo cures after judgment had upon a *cognovit actionem*, or *relicta verificatione*, ſeveral other matters, variances, and miſtakes therein mentioned, not being againſt the *right* of the matter of the ſuit, or whereby the iſſue or trial are altered; —all which miſtakes, *&c.* are declared to be amendable by the judges of the courts where ſuch judgments are or ſhall be given, *or* by the judges of the court whereunto the record is or ſhall be removed by writ of *error*.

An actual amendment is never made on this ſtatute (as it ſhould ſeem there ought to be), but the benefit of the act is attained by the courts overlooking the exception. *Stra.* 1011.

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This laſt, as well as the former ſtatutes, being chiefly calculated to aid imperfections after *verdict*—and the ſtatute 27 *of Eliz. c.* 5.* aiding defects in *form* only on a *general demurrer*, it was thought adviſeable to enlarge the authority of the courts further in favour of ſuitors, which occaſioned the ſtat. 4 & 5 *Anne, c.* 16. which extends the 27 *of Eliz.* and enacts, that the judges, in caſe of *demurrer* joined and entered, ſhall proceed and give judgment according as the very right of the cauſe and matter in law ſhall appear, without regarding any imperfection, omiſſion, or defect *whatſoever*, except thoſe only which the party ſhall ſpecially ſet down as *cauſe of demurrer*, notwithſtanding that ſuch imperfection, *&c.* might have theretofore been taken to be matter of *ſubſtance*, and not aided by the 27 *of Eliz.* ſo as ſufficient matter appear in the pleadings—and declares that no advantage ſhall be taken for the defaults therein particularly mentioned (which were matters of *ſubſtance*), except the ſame ſhall be ſpecially ſet down and ſhewn for *cauſe of demurrer*. And by this act, all the ſtatutes of *jeofails* are extended to judgments upon *confeſſion*, *nil dicit*, or *non ſum informatus*, in any court of record.

The 9 *of Anne, c.* 20. alſo extended all the ſtatutes of *jeofails* to writs of *mandamus*, and *informations* in the nature of *quo warranto*.

Notwithſtanding all the foregoing ſtatutes, and the great enlargement of the power of the judges thereby given, in amending *writs*, *proceſſes*, &c. yet none of them were thought to ex-

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* By this act, entitled "*An act for furtherance of juſtice, in caſe of demurrer and pleadings*," it is enacted, "That after *demurrer* joined and entered in any action or ſuit in any court of record, the judges ſhall proceed and give judgment according as the very right of the cauſe and matter in law ſhall appear unto them, without regarding any imperfection, defect, or want of form, in any writ, return, plaint, declaration, or other pleading, proceſs, or courſe of proceeding, *except thoſe only which the party demurring ſhall ſpecially and particularly ſet down and expreſs, together with his demurrer*; and that no judgment to be given ſhall be reverſed by any writ of error, for any ſuch imperfection, defect, or want of form as is aforeſaid, except ſuch only as is before excepted.——And that after *demurrers* joined and entered, the court where the ſame ſhall be, ſhall and may, from time to time, amend all and every ſuch imperfections, defects, and wants of *form*, as is before mentioned, other than thoſe only which the party demurring ſhall ſpecially and particularly expreſs and ſet down, together with his demurrer as is aforeſaid.

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tend to *writs of error*; and the rather, becauſe ſuch amendment would not be in *affirmance* of the judgment—which occaſioned the 5 *Geo.* 1. *c.* 13. by which all writs of error, wherein there ſhall be any variance from the original record or other defect, ſhall and may be amended and made agreeable to ſuch record by the reſpective courts where ſuch writ or writs of error ſhall be made returnable; and that after *verdict* no judgment ſhall be ſtayed or reverſed for any defect or fault either in form or ſubſtance, in any bill, writ, original or judicial, or for any variance in ſuch writ from the declaration or other proceedings.

And herein of entering Proceſs on the Roll to ſave the Statute of Limitations.

THE ſtatute 21 *Jac.* 1. *c.* 16. *ſ.* 3. for limiting perſonal actions, enacts, "That all actions of treſpaſs *quare clauſum fregit*, all actions of treſpaſs, detinue, action *ſur* trover, and replevin for taking away of goods and cattle, all actions of account and upon the caſe, other than ſuch accounts as concern the trade of merchandize between *merchant* and *merchant*, their factors or ſervants, all actions of debt grounded upon any lending or contract without ſpecialty: all actions of debt for arrearages of rent, and all actions of aſſault, menace, battery, wounding, and impriſonment, or any of them which ſhall be ſued or brought, ſhall be commenced and ſued within the time and limitation hereafter expreſſed, and not after, (that is to ſay;)

"Actions upon the caſe (other than for ſlander), actions for account, actions for treſpaſs, debt, detinue, and replevin for goods or cattle, and actions of treſpaſs *quare clauſum fregit*, WITHIN SIX YEARS next after the cauſe of ſuch actions or ſuit, and not after:

"And actions of treſpaſs, of aſſault, battery, wounding, impriſonment, or any of them, WITHIN FOUR YEARS next after the cauſe of ſuch actions or ſuit, and not after:

"And actions upon the caſe for words WITHIN TWO YEARS next after the words ſpoken, and not after."

And by *ſect.* 7. it is provided, "That if any perſon or perſons that is or ſhall be entitled to any ſuch action of treſpaſs, detinue, action *ſur* trover, replevin, actions of accounts, actions of debt, actions of treſpaſs for aſſault, menace, battery, wounding, or impriſonment, actions upon the caſe for words, be or ſhall be at the time of any ſuch cauſe of action given or accrued, fallen or come, within the age of twenty-one years, feme covert, *non compos mentis*, impriſoned, or *beyond the ſeas* *; that then ſuch perſon or perſons ſhall be at liberty to bring the ſame actions, ſo as they take the ſame within ſuch times as are before limited after their coming to or being of full age, diſcovert, of ſane memory, at large, and returned from beyond the ſeas, as other perſons having no ſuch impediments ſhould have done."

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* A foreigner who reſides always beyond ſeas, is not bound by this ſtatute, as the exception is general, and may reply the fact to the plea of the ſtatute. 2 *Blackſ. Rep.* 723.

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And herein of entering Proceſs on the Roll to ſave the Statute of Limitations.

This ſtatute bars the plaintiff's action if he do not *commence* it within the time therein expreſſed; or if diſabled at the time the action accrued, if he do not commence it within the limited times after the diſability removed from himſelf—but the 4 & 5 *Ann. c.* 16. *ſ.* 19. entitles the plaintiff, in caſe the *defendant is beyond ſea* at the time the action accrues, to bring his action within the limited time, according to the ſtat. 21 *Jac.* 1. after the defendant ſhall be returned.

Both the ſtatutes of 21 *Jac.* 1. & 4 & 5 *Ann.* are expreſs, that the party to be excuſed *muſt be beyond the ſeas.* And therefore the ſtatute of limitations extends to perſons in *Scotland*; for they are not *beyond the ſeas. King* v. *Walker.* 1 *Blackſ. Rep.* 286. And therefore a plaintiff living in Scotland ſhall be barred of his action, if he does not commence it within the time ſpecified by the ſtatute.

A *latitat* is good to avoid the ſtatute of limitations, without a *bill of Middleſex* previouſly ſued.—So is a *capias* without an *original. Metcalf* v. *Burrowes*, 14 *Geo.* 2. *Bull. Ni. Pri.* 151. *Vide Stra.* 736. And a *capias* is good evidence of a preceding original. *Leader* v. *Moxons. M.* 14 *Geo.* 3. *C. P.* 2 *Blackſ. Rep.* 925.

An attachment of privilege (though informal in being made on a *general* return) is a ſufficient commencement of an action, to avoid the ſtatute of limitations. *Leadbeater* v. *Markland. H.* 17 *Geo.* 3. *C. P.* 2 *Blackſ. Rep.* 1131.

And a *latitat* ſued in vacation will, by fiction of law, ſave the limitation of time, unleſs the defendant in his *rejoinder* ſet out the day on which the *latitat* iſſued. *Lambert* v. *Whiteley*, *E.* 1760. *K. B. Vide Ld. Raym.* 432, *&c.* 386. 880. 553. For the true time of ſuing out a *latitat* may be averred againſt the *teſte* of it. *Johnſon* v. *Smith.* 1 *Blackſ. Rep.* 215.

The proceſs ſued out with a view to avoid the *ſtatute of limitations*, muſt be carried to the ſheriff's office, in order to be returned with a *non eſt inventus*, after which it muſt be entered on a roll in this manner:

As yet of the term of the *Holy Trinity.* Witneſs, *William earl of Mansfield.*

" *Middleſex*, to wit. The ſheriff is commanded to take *C. D.* and *E. F.* if they may be found in his bailiwick, and keep them ſafely, ſo that he may have their bodies before *our lord the king at Weſtminſter*, on *Wedneſday* next, after three weeks

And herein of entering Proceſs on the Roll to ſave the Statute of Limitations.

from the day of the *Holy Trinity*, to anſwer *A. B.* in a plea of treſpaſs, and to have then there this *precept*. *By bill. Stormont* and *Way*. At which day, before our lord the king, at *Weſtminſter*, came as well the aforeſaid *A. B.* in his proper perſon, and offered himſelf againſt the ſaid *C. D.* and *E. F.* in the plea aforeſaid; and the ſheriffs, namely, *Thomas Wright* and *Evan Pugh*, Eſquires, ſheriff of the county of *Middleſex* aforeſaid, returned, that the aforeſaid *C. D.* and *E. F.* are not, nor is either of them found in his bailiwick.

Roll.

This entry of a *bill of Middleſex* will ſerve to illuſtrate the practice upon other proceſs, for if the proceſs ſued forth be a *latitat* or *attachment of privilege* in *B. R.* it muſt be ſet forth upon the roll, with the return, in the ſame form—and ſuch proceſs, when returned, muſt be taken to the ſigner of the writs in *B. R.* to file the ſame, and the roll carried to the clerk of the judgments to be entered and docqueted; the plaintiff's attorney making out a docquet paper in this manner:

Entry of *William Lyon*, gentleman, one, *&c.*

Middleſex, to wit. Entry of a *bill* to ſave the ſtatute between *A. B.* plaintiff, and *C. D.* and *E. F.* defendants.

Returnable, *&c.*

Roll.

If in *B. R.* the proceſs ſued forth is an *original* or *capias*, the entry thereof, with the return, muſt be made out accordingly, and docquetted, ſuch *proceſs* when returned being filed with the *filazer*.

So, in *C. B.* if it be an *original* or *capias*, the ſame muſt be filed with the *filazer*, and the roll carried in and docquetted with the clerk of the judgments.

If a plaintiff would take advantage of proceſs ſued out in this manner; upon the defendant's coming into court afterwards, and pleading the ſtatute in bar of the action, the plaintiff muſt ſhew that he has continued the writ to the time of the action brought, and muſt ſet forth that the firſt writ was returned. For if the defendant plead *non aſſumpſit infra ſex annos ante exhibitionem billæ*, and the plaintiff tenders an iſſue thereon, and iſſue be taken, the plaintiff cannot give the *latitat* in evidence; for a *latitat* may either be the commencement of the action, or only proceſs to bring the defendant into court; and as proceſs

it

And herein of entering Proceſs on the Roll to ſave the Statute of Limitations.

it may be ſued out before the cauſe of action accrues. *Bull. Ni. Pri.* 151.

So that the plaintiff to ſuch plea, inſtead of tendering iſſue, ſhould reply a *latitat*, ſued out at ſuch a time, and ſhew the ſame returned; then continue the ſame in his replication to the proceſs on which the party comes in; averring, that the firſt proceſs ſued out and returned, was ſued out with a view to exhibit his bill, or declare for the ſame identical cauſe of action; and that the ſame was ſued out within the time limited by the ſtatute. *Vide Salk.* 420.

The continuances in ſuch caſe, where the plaintiff is driven to ſhew the writ continued, may be entered upon the roll at any time.

Neither the king, nor eccleſiaſtical perſon, are within the ſtatute of limitations. 11 *Rep.* 74.

If one ſues out an *original*, or takes out a *latitat* in a perſonal action within the time limited by the ſtatute, and upon his *latitat* hath a *non eſt inventus* returned by the ſheriff, and enters his writ upon the roll, and files it, though he doth not declare againſt the party within the time limited by the ſtatute, the action ſhall be ſaid to be brought in due time. 2 *Vent.* 192, 193. 259.

If an action is properly commenced in an *inferior court* within the *ſix years*, and the defendant removes it by *habeas corpus* into the *King's Bench*, the ſtatute of limitations will be no bar to the plaintiff in the *King's Bench*, though ſix years were elapſed after the cauſe of action accrued, and before the removal of the ſuit into the *King's Bench*. *Bevin* v. *Chapman*. *Mich.* 16 *Car.* 2. 1 *Sid.* 228. 1 *Lev.* 143. *Vide Ld Raym.* 1427. That is, if plaintiff replies the ſuit below, and ſhews that to have been within the ſix years. 2 *Salk.* 424.

In aſſumpſit, defendant pleaded the ſtatute of *limitations*, and the plaintiff replied that defendant was a parliament man, *&c.* and the plea was overruled; becauſe one may file an original againſt a parliament man, and continue it down without any breach of privilege, here being no actual moleſtation of his perſon or eſtate, and that this ſhould be ſo is of abſolute neceſſity, in order to ſave the bar of the ſtatute; for ſuch caſe not being provided for by an exception, the plaintiff would be barred of his action, if he could not file an original. *Lev.* 111. *Mod.* 145. 2 *Salk.* 512. *Show.* 99. *Carth.* 137. *Ld. Raym.* 1113.

Where

Where PLAINTIFF shall recover Costs.

AT common law, costs or *expensa litis* were generally included in the *damages* given by the jury; but as they often omitted to give adequate damages, it was enacted that,

" *The demandant* in assize of *novel disseisin*,
" *in writs of mort d'aunceſter*, *coſinage*, *aiel*
" *and beſail*, shall have *damages*.—And *de-*
" *mandant* shall have the * costs of the *writ*
" *purchaſed*, together with the *damages*; and *Stat. of Glouc.*
" this act shall hold place in all cases where 6 *Edw.* 1. *c.* 1.
" the party recovers *damages*. And every
" person shall render *damages* where land is
" recovered against him, upon his own intru-
" sion, or his own act."

This statute only gives *costs* in those actions mentioned in it, and those other actions, in which the plaintiff before the making of it recovered *damages*; so that, where damages were not recoverable before, no costs are hereby given.—And though a subsequent act gives *damages*, where none were recoverable before; yet, if *costs* are not also given, no *costs* shall be recoverable.

For instance, in *waste* against *tenant for life*, *years*, or in *dower*, *treble damages* are recoverable by the *Stat. of Glouc. c.* 5. but *no costs*; because *waste* did not lie before, against such tenants, and no *costs* are given by that act upon recovery of *damages*.

So *Weſtm.* 2. *c.* 5. *ſ.* 3. gives damages in *quare impedit*, and *darrein preſentment* in two cases; but as there is no mention of *costs*, costs are not recoverable, because *damages* were not given therein, before the above *statute of Glouceſter*.

So no *costs* in an action on 5 *Edw.* 6. *c.* 14. of engrossers.

So no *costs* in an action on 1 & 2 *P.* & *M. c.* 12. for driving a distress out of the hundred.

So no *costs* in an action of *ſcand. mag.* because such action did not lie at common law; and the statute which gives such action, makes no mention of costs.

So no *costs* in *formedon* or on a *writ of right*, because no damages recoverable therein; nor are damages given therein by the *Stat. of Glouceſter*.

---

* *Costs*, meant by this or any subsequent statute, are the *expensa litis*, such as shall be allowed upon taxation of costs by the *master* or *prothonotary*; but plaintiff is not to be allowed money expended on account of himself, or for the loss of his own time.

So

Where PLAINTIFF shall recover Costs.

So no *costs* in an *attaint*.

But where a certain sum is given by a subsequent statute, to a party injured in an action wherein damages were recoverable before the *statute of Gloucester*, the plaintiff shall also have *costs*, though costs are not mentioned in such subsequent statute; as in an action by the party injured, on the riot act, 1 *Geo.* 1. *c.* 5.

So if such subsequent statute give *double* or *treble damages* in such action, *costs shall be doubled or trebled also.*

In actions sounding in *damages*, the jury cannot regularly give plaintiff more than he hath counted for, yet if the jury would give him full damages, they may award him *costs* distinct and separate from the *damages*. And though such costs exceed the damages laid in the declaration, yet the plaintiff shall have both. For in such case the *damages* are given for the wrong, for which the action is brought, and the *costs* for the charge of the suit. The one before the suit, and the other in and for the suit.

Where PLAINTIFF shall have NO MORE COSTS than DAMAGES, if the Damages found are under FORTY SHILLINGS.

" IF upon any *personal action*, not being for any title or interest of land, nor concerning the freehold or inheritance of lands, nor for any *battery*, it shall be * *certified* by the judge before whom tried, that the debt or damages recovered, shall not amount to 40 shillings or above, the plaintiff shall have *no more costs*, than the *debt* or *damages* recovered." 43 *of Eliz. c.* 6. *s.* 2.

By *personal actions*, the statute means such actions as *debt*, *assumpsit*, *assault*, *trespass de bonis*, and the like actions; but not *trespass* where the interest or title to land might come in question, though *collaterally*; as in a justification by a bailiff or agent, in taking, as a distress, under a reservation in a lease, and issue joined upon defendant's being bailiff or not; if plaintiff recovers damages *under* 40 *shillings*, it seems a *certificate* ought to be granted to intitle plaintiff to more costs than damages.

" In actions for slanderous *words*, if *damages* are given [that is, either by a jury at trial, or on a writ of inquiry, for it extends to both cases] *under forty shillings*, plaintiff shall have no more *costs* than *damages*." 21 *Ja.* 1. *c.* 16. *s.* 6.

This statute means *words* only in themselves actionable without *special damages*. Therefore for *words* not actionable in themselves, but only actionable by reason of *special damage*, the plaintiff, though he recovers damages *under forty shillings*, shall nevertheless have *full costs*.—But for words in themselves actionable, although plaintiff lays *special damages*, if the jury gives him less damages than *forty shillings*, he shall have no more costs than damages.

Even if defendant pleads *double* and justifies, and there be a general verdict against him, it seems, if plaintiff recovers less than *forty shillings*, he shall have no more costs than damages under this act, if the *words* in themselves were actionable.

Slander of title, is neither within the words, nor the meaning of this act; the *special* damage being in such case the gift of the action.

Action for a *libel* is not within it, and plaintiff shall have his costs, though the damages given are under 40 *shillings*.

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* The *certificate* on this statute may be granted after trial.

Where

Where PLAINTIFF shall recover FULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not.

"IN all action of *trespass, assault and bat-*
"*tery*, and other *personal actions*, wherein
"the judge at the trial shall not certify under
"his hand upon the back of the record, that
"an *assault and battery* was sufficiently proved
"by the plaintiff against the defendant, or
"that the *freehold or title of the land mentioned*
"*in plaintiff's declaration* was chiefly in
"question, the plaintiff in such action, if the
"jury find damages *under forty shillings*, shall
"not recover more *costs* than the damages
"found; and if more costs shall be awarded,
"the judgment shall be void, and defendant
"acquitted from the same, and may have his
"action against the plaintiff for such vexa-
"tious suit, and recover his *damages and costs*
"of such his suit."

* 22 & 23 *Car.* 2. *c.* 9.

This statute, notwithstanding the words "*other personal* "*actions*," extends only to actions of *trespass quare clausum fregit*, and *assault* and *battery*; because the intention was not to prevent a plaintiff from recovering full costs in any action, except such wherein it was possible for the judge to certify that an *assault* and *battery* were sufficiently proved, or that the *freehold* or *title* of the land was chiefly in question; which *certificate* can be but in those actions.

On a *writ of enquiry* on this statute, if damages *under forty shillings* are given by the inquest, the plaintiff shall have *full costs*, because this statute is confined to the case of damages *found by the jury at the trial*; and does not, like the statute 21 *Ja.* 1. *c.* 16. extend to both cases.

After removal of a cause from an inferior court by defendant, if damages are given *under forty shillings*, though the judge do not *certify*, plaintiff shall have full costs.—But not if the cause be removed by the plaintiff, for if so he might be more vexatious.

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* This statute, and all statutes preceding it, for prevention of frivolous and vexatious suits in the superior courts, are extended to the courts of great *sessions in Wales*, and *courts of the counties palatine*, by 11 & 12 *W.* 3. *c.* 9.

This

Where PLAINTIFF shall recover FULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not.

This statute only prevents the *court* [without a *certificate* from the judge], but not the jury at the trial, from giving more costs than damages, *if under forty shillings*; therefore the jury may find *costs* to more than *forty shillings*, though they find *damages under that sum*.

The *certificate*, to entitle plaintiff to full costs upon this statute, must be granted at the trial; and must be, that an *assault* and *battery*, or that the *freehold*, or *title of the land* mentioned, was chiefly in question.

But in *crim. con.* with plaintiff's wife, if damages *under forty shillings*, plaintiff shall have full costs without a certificate; because the assault is not the gist of the action, but the *crim. con.*

A plaintiff, by the 43 *of Eliz.* is deprived of *full costs* upon a judge's certificate—but by the 22 & 23 *of Car.* 2. plaintiff, in the actions therein mentioned, is entitled *to full costs* upon a judge's certificate, if the *damages found are under forty shillings*.

The first extends to all *personal actions* [except for a *battery*, or for *title* or *interest* in land, concerning freehold, or inheritance], the latter only to *assault* and *battery*; and *trespass*, where *freehold* or *title* is chiefly in question.

So that under the latter, where the judge cannot certify that an *assault* and *battery* was proved, or that the *freehold* or *title* was chiefly in question, the plaintiff shall recover his *full costs*, notwithstanding damages under *forty shillings* without a certificate; as in *debt*, *assumpsit*, *trover*, *trespass for taking his horse*, *bull*, *or sheep*—*or for cutting or breaking his net*,—*or for taking his goods*;—*trespass for spoiling his goods*;—*trespass for beating his servant*, per quod, &c.—*or for breaking his close*, *and impounding his cattle*,—(if defendant is found guilty of the impounding) *or for breaking his close*, *and cutting and taking away his corn* (if defendant is found guilty of cutting and taking the corn *.) But in *trespass for breaking his close*, *and digging therein*;—*or for entering his house and breaking the door*,—*or for fixing stakes on his ground*,—*or entering his close*, *and throwing down*

* But if the defendant is acquitted of *cutting and taking away the corn*, or of *impounding the cattle*, then the case is within the statute of *Car.* 2. and without a *certificate* plaintiff will not have *full costs*.

Where PLAINTIFF ſhall recover FULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not.

fences and pales,—or for entering and building a wall on his cloſe, and ſuch like caſes;—if damages are given *under forty ſhillings*, plaintiff ſhall not have his full coſts without a *certificate* from the judge at the trial; becauſe in all ſuch caſes, the *freehold* or *title* to the land or houſe, mentioned in the declaration, is in queſtion.

In all caſes however, if it appears upon the *pleadings* that the *freehold* or *title* was in queſtion, there needs no *certificate* to entitle the plaintiff to *full coſts*, though the damages are *under forty ſhillings*; becauſe the *certificate* could ſay no more than what appears on the record. As if it appears on the pleadings that a view was granted, or that defendant juſtified for a right of way, and plaintiff replied *extra viam:* for on ſuch iſſue, the breadth of the way, and conſequently the *title* is in queſtion. So in *aſſault* and *battery*, if defendant juſtifies, for then he admits the *battery*. So, if plaintiff declares on a *clauſum fregit* in one count, and for an injury to a chattel,—or for taking his hog,—or for an *aſportation* in another count, and there be a general verdict, and damages *under forty ſhillings*, he ſhall have *full coſts* without a *certificate*; becauſe, upon the ſecond count, it was not in the judge's power to *certify*.—So, if *treſpaſs on land and an aſportation* be charged in one count, and there be a general verdict and damages *under forty ſhillings*.—So, if a treſpaſs on land and chaſing his cattle be charged.—So, if it be for breaking and entering his *free warren*, and killing and chaſing his hares, conies, &c. But in treſpaſs *for breaking and entering a houſe, breaking window-ſhutters, and ſpoiling the bolts thereto*;—or *for breaking and entering a houſe, making a noiſe, continuing there and making plaintiff give*, &c.—Or, *for breaking cloſe, cutting down, lopping, and ſpoiling trees*; or *breaking cloſe, treading down, digging and taking away ſods, earth*, &c. for here what is called an *aſportation* is a mode, a qualification of the injury done to the land.—Or, *for treſpaſs in his cloſe with cattle, and ſpoiling the fruit there found*;—Or, *for breaking and entering a houſe, keeping plaintiff out of poſſeſſion* with a *per quod*;—Or, *for breaking and locking up a houſe, detaining goods therein*;—Or, *for aſſault and battery, throwing him down and thereby ſpoiling his cloaths*; and in all theſe and the like caſes, if a general verdict and damages *under forty ſhillings* are given, there ſhall be no more *coſts* than *damages*, without a *certificate*.

" Whereas

Where PLAINTIFF shall recover FULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not.

" Whereas great miſchiefs do enſue by " *inferior* tradeſmen, apprentices, and other " diſſolute perſons, neglecting their trades " and employments, who follow hunting, " fiſhing, and other game to the ruin of " themſelves and damage of others.—It is " enacted, That, if any ſuch perſon ſhall " preſume to hunt, hawk, fiſh or fowl (un- " leſs in company with the maſter of ſuch 4 & 5 *W. & M.* " apprentice, duly qualified by law), ſuch *c.* 23. *ſ.* 10. " perſon ſhall be ſubject to the penalties of " this act, and may be ſued and proſecuted " for their wilful treſpaſs, in ſuch their com- " ing on others land; and if found guilty " thereof, the plaintiff ſhall not only recover " his damages thereby ſuſtained, but his *full* " *coſts of ſuit:* any former law to the con- " trary notwithſtanding."

Who is an *inferior tradeſman*, and who not, within the meaning of this act, is ſtill undetermined—though it has been adjudged, if a perſon be an inferior tradeſman, as a *clothier*, *&c.* it matters not what qualification he may have in eſtate, but if found guilty of ſuch *treſpaſs*, he ſhall be liable *to full coſts*.

But it has been adjudged in *treſpaſs* for hunting, laid upon this ſtatute, againſt defendant as a *diſſolute perſon*, *&c.* if the plaintiff proves only the *treſpaſs*, but not the circumſtances under the ſtatute, and has a verdict, he ſhall recover as in common actions of *treſpaſs*, *viz. no more coſts than damages*, if the damages are under 40 *ſhillings:* for not proving the ſpecial circumſtances, the action is then no other than a common action of treſpaſs.

The ſtatute 22 & 23 *Car.* 2. before mentioned, being conſtrued ſo ſtrictly by the courts, that in *treſpaſs quare clauſum fregit* the judges could not certify, unleſs the *freehold* or *title* were in queſtion; plaintiffs were frequently deprived of coſts if they recovered but ſmall damages, when the *treſpaſs* they complained of was wilfully and maliciouſly committed. To remedy this, it was enacted, that

" In

Where PLAINTIFF shall recover FULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not.

" In all actions of *treſpaſs* in any of his " majeſty's courts of record at *Weſtminſter*, " wherein at the trial of the cauſe, it ſhall " appear and be *certified* by the judge, under " his hand, upon the back of the record, " that the treſpaſs upon which any defendant " ſhall be found guilty, was *wilful and ma-* " *licious*, the plaintiff ſhall recover, not only " his damages, but *his full coſts of ſuit*, any " former law to the contrary notwithſtanding." 8 & 9 W. 3. c. 11. ſ. 4.

Every *treſpaſs* is *wilful*, within the meaning of this act, where the defendant has notice, and is eſpecially forewarned, not to come on the land; as every *treſpaſs* is *malicious*, though the damages may not amount to *forty ſhillings*, where the intent of the defendant plainly appears to have been to haraſs, vex, and diſtreſs the plaintiff: ſo that every treſpaſs, that is ill-naturedly committed or done, after notice, is a *malicious* treſpaſs.

The *certificate* on this ſtatute muſt be made by the judge in court at the trial, otherwiſe it is void.

To diſcourage plaintiffs from ſuing in the ſuperior courts for trifling matters, after reciting an act for the eſtabliſhment of the court of requeſts in the *city of London*, for the recovery of ſmall debts, it was enacted,

" That if any action of *debt*, or upon the " caſe upon an *aſſumpſit*, for the recovery of " any debt, proſecuted againſt any of the *per-* " *ſons* * aforeſaid, in any of the king's courts " at *Weſtminſter*, or elſewhere, out of the " ſaid *court of requeſts*, it ſhall appear to the " judge or judges, that the debt to be reco- " vered doth not amount to the ſum of *forty* " *ſhillings*, and the defendant in ſuch action " ſhall duly prove, either by ſufficient teſti- " mony, or by his own oath, to be allowed 3 Jac. 1. c. 15. ſ. 4.

* That is, perſons inhabiting within the ſaid city, being *tradeſmen*, *victuallers*, or *labouring men*;—but the ſtatute 14 Geo. 2. c. 10. extends this act to all perſons renting or keeping ſhop, ſhed, ſtall, ſtand, or ſeeking a livelihood in the city or liberties.

Where PLAINTIFF shall recover FULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not.

" by any the judge or judges of the said court " where the action shall depend, that at the " time of commencing such action, defend- " ant was inhabiting and resiant in the city of " *London*, or liberties thereof; the said judge " or judges shall not allow to the said plaintiff " *any costs of suit*, but shall award the plain- " tiff to pay so much ordinary costs to the de- " fendant as he shall prove before the said " judge or judges it hath truly cost him in " defence of the said suit."

3 *Jac.* 1. *c.* 15 *s.* 4.

Vide the statute 14 *Geo.* 2. which extends this act to all persons within the city and liberties, and the further provisions therein.

Since the making of this statute, *courts of requests, or conscience*, have been erected in various places, as in *Westminster*, *Southwark*, *Bristol*, *Glouceſter*, *&c.* and some statutes give *double costs* to the defendant, if sued in a superior court for a debt *under forty shillings*.

If the defendant does not plead the statute in *bar* of the action in the *superior court*, but suffers a *verdict* to go against him, he may take advantage of such statute by entering a *suggestion on the roll*.—But if he lets judgment go by *default*, he precludes himself from taking any advantage of the statute, and cannot make a *suggestion on the roll* to have his costs; for when an inquest is taken by *default*, the defendant is out of court to all purposes but having judgment against him.

Notwithstanding plaintiff declares for more than *forty shillings*, yet if the jury give him a *verdict* for less than *forty shillings*, the real debt or demand at the commencement of the action, the defendant [if a person within the act] may make his *suggestion* on the roll to have his costs, and the costs of the suggestion shall also be included.—But if the original debt was above *forty shillings* at the commencement of the suit, and defendant pleads, or gives in evidence a *sett-off*, and plaintiff has a verdict for the balance under *forty shillings*, the defendant can make no *suggestion*.—Otherwise, if defendant gives in evidence, payment before action commenced, which reduced the debt under *forty shillings*, at the time it was commenced.

If defendant would take advantage of such statute, it must be by motion for leave to enter a *suggestion on the roll*, which motion

Where PLAINTIFF shall recover FULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not.

motion must be made on an *affidavit* of the fact on the part of the defendant.

When the *suggestion* is entered with leave, the method is to grant a rule; and unless plaintiff pleads thereto within the time limited, or demurs, the allegation of defendant in his suggestion is taken *pro confesso*, and the officer will allow the costs, whether *single*, *double*, *or treble*, as the statute directs.

These statutes do not extend to cases where *executors* are defendants.

Where DEFENDANT ſhall recover Coſts.

" IF any chief lords do maliciouſly implead " *feoffees*, faining this caſe, namely, where " the feoffments were made lawful, and in " good faith, then the feoffees ſhall have " their damages awarded, and their *coſts* " which they have ſuſtained by occaſion of " their aforeſaid plea, and the plaintiffs ſhall be " grievouſly puniſhed by amerciament." *Stat. of Marlberge*, 52 *H.* 3. *c.* 6.

" If plaintiff in any action, bill, or plaint " of *treſpaſs*, upon the ſtatute of *Rich.* 2.— " or of *debt or covenant* upon any ſpecialty, " or upon any *contract* ſuppoſed to be made, " or of *detinue* of any goods or chattels on a " ſuppoſed right of property, or of *account*, " *upon the caſe*, or upon *any ſtatute*, for any " offence or wrong perſonal ſuppoſed to be " done, after *appearance of defendant*, be non- " ſuited; or that any verdict happen to paſs " by lawful trial againſt the plaintiff, then " the defendant ſhall have judgment to reco- " ver his *coſts*, to be aſſeſſed and taxed by the " court; and ſhall have ſuch proceſs and exe- " cution for the recovery and having of his " coſts of the plaintiff, as ſuch plaintiff might " have had againſt the defendant, in caſe judg- " ment had been given for the plaintiff." 23 *H.* 8. *c.* 15.

" Perſons ſuing *in forma pauperis* in ſuch caſe, to be other- " wiſe puniſhed."

The ſtatute 24 *Hen.* 8. *c.* 8. excepts plaintiffs ſuing for the uſe of the king from paying coſts, under the above ſtatute, in caſe of *nonſuit or verdict* againſt them.

The above ſtatute ſpecifying only actions of *treſpaſs* on lands, *debt*, *covenant*, *detinue*, *account*, *caſe*, and *upon ſtatutes* for offences or perſonal wrongs, was extended, to give defendant coſts after " *nonſuit or verdict* for him " in *treſpaſs* or *ejectment*, and *every other action* " wherein plaintiff or demandant might have " coſts upon obtaining judgment." 4 *Jac.* 1. *c.* 3.

If judgment is given for defendant upon a *ſpecial verdict*, it is within theſe acts, and he ſhall have *coſts*.

If

Where DEFENDANT shall recover COSTS.

If plaintiff is *nonsuit*, or *defendant* obtain a *verdict* on the 9 *Geo.* 1. (the riot act), the defendants shall have costs, because the plaintiff, if he had obtained judgment, would have been intitled to costs.

The foregoing statutes extend only to the cases of *nonsuit or verdict*; but to prevent malicious attachments and arrests by *latitat*, *alias*, *and pluries capias* in the *King's Bench*, and by process in the *Marshalsea court*, *and other inferior courts*, it was enacted,

" That as often as any person shall sue, " or cause or procure to be sued forth, any " of the writs or process before mentioned, " against any person, by which such person " be arrested, or to which he shall appear " upon the return, and put in bail, that then, " if the party suing do not within three days " after such bail taken, put into the same " court his declaration—or if after declara- " tion had and put in, the plaintiff shall not " prosecute the same with effect, but shall " willingly delay or *discontinue* his suit, or " become *nonsuit* thereon, the judges shall " award defendant his *costs*, *&c.*" 8 *Eliz. c.* 2. *s.* 2.

There are like clauses for the *inferior* courts therein mentioned, but the court of *Common Pleas* is not within it.

" Unless plaintiff, who has sued process " out of the *King's Bench* and *Common Pleas*, " shall put in his declaration against defend- " ant in *personal actions* and *ejectment*, before " the end of the term next after appearance, " a *nonsuit* may be entered, and defendant " shall have *costs*, to be levied as provided by " the *stat.* 23 *Hen.* 8." 13 *Car.* 2. *st.* 2. *c.* 2.

This statute does not extend the provision in the 8 of *Eliz.* above mentioned, in case of a *discontinuance* in the *King's Bench* to the court of *Common Pleas*; and the reason for the omission seems to be, that in the *Common Pleas* a plaintiff could not *discontinue* without leave; in granting which, the court always annexed the condition of *paying costs*.

The statutes before mentioned, only give a defendant his *costs*, upon plaintiff's *discontinuance*, *not declaring in time*, upon being

Where Defendant shall recover Costs.

being *nonsuited*, and *upon a verdict against him*.—So that there were many cases still unprovided for; and first,

" Where several persons shall be made *de-*
" *fendants* in *trespass*, *assault*, *false imprison-*
" *ment*, or *ejectment*, and any one or more
" shall, upon trial thereof, be acquitted by
" *verdict*, he or they shall recover his *costs* of
" suit, unless the *judge* before whom the
" cause shall be tried, shall immediately after
" the trial, in open court, *certify* upon the
" record, that there was a reasonable cause
" for making him or them defendant or de-
" fendants."

8 & 9 *W.* 3. *c.* 11. *s.* 1.

From the words of this statute, it extends only to trespass *vi et armis and ejectment*, not to trespass *on the case*, *or replevin*; for every statute giving *costs* is to be construed strictly, costs being in nature of a penalty.

" If any one shall commence or prosecute
" an action in any court of record, wherein
" upon any *demurrer*, either by plaintiff or
" defendant, demandant or tenant, judg-
" ment shall be given against such plaintiff
" or demandant, the defendant or tenant
" shall have judgment to recover his *costs*,
" and have execution for the same by *ca. sa.*—
" *fi. fa*—or *elegit*."

8 & 9 *W.* 3. *c.* 11. *s.* 2.

This statute only gives costs to defendant if judgment upon demurrer is given for him when the *demurrer* is to the *merits*, and not when the *demurrer* is to a plea in *abatement*; for if on a *demurrer* to a plea in abatement, the plaintiff has judgment, *quod respondeat ouster*, the plaintiff is not entitled to costs; and if on such *demurrer*, the defendant has judgment, either *quod breve* or *billa cassetur*, or *quod quærens nil capiat*, he is not entitled to costs.

It has been held, that *quare impedit* is within this act, but that *formedon* is not, notwithstanding the words " *demandant* " *or tenant*," and the reason assigned was, that in *formedon*, the *demandant* could not recover costs, if he had a verdict; nor could the *tenant*, if he had a verdict, or the demandant was nonsuited. *Ergo*, this statute could not extend to give costs to the *tenant* on a *demurrer* in this action, by which no *costs* were otherwise recoverable by either party.

" Defendant

Where Defendant shall recover Costs.

" Defendant or tenant in any action, or any " plaintiff in *replevin*, may, with leave of the " court, plead as many several matters, as he " shall think necessary for his defence—pro- " vided, that if any such matter shall, upon " *demurrer* joined, be adjudged insufficient, " *costs* shall be given at the discretion of the " court; or if a *verdict* shall be found upon " any issue for plaintiff or demandant, costs " shall also be given in like manner; unless " the judge who tried the issue shall certify *, " that the defendant or tenant, or plaintiff " in *replevin*, had probable cause to plead " such matter, upon which the said issue shall " be found against him."

4 & 5 *Anne*, c. 16. s. 4, 5.

This statute does not extend to *qui tam* actions, so as to give defendant liberty to plead double in them. Nor to plead double in any case against the crown. Nor does it extend to plead double matters which shall have different trials.

If the issue is found for plaintiff on a special plea, or there is judgment for him on a demurrer to such plea, he is to have costs by the express provision of this act, 4 & 5 *Anne*.—But if on a demurrer to a special plea there is judgment for plaintiff, before trial on the general issue, and afterwards defendant has a verdict on the general issue, it seems the plaintiff shall not have those costs, because it appears ultimately that he had no cause of action.

In an action for *crim. con.* not guilty, and not guilty within *six years*, were pleaded, issue on the first, and *demurrer* to the second. The issue was tried first, and plaintiff had a verdict for *fifty pounds*. The demurrer was afterwards argued, and defendant had judgment thereon. Defendant in this case had his costs of the *demurrer*, and neither had the costs of the trial. For though plaintiff had a *verdict* for damages, the judgment on the *demurrer* shewed he had no right of action; and defendant had no right to the costs of the issue, that being found against him.

In trespass, there was not guilty, and two special pleas; to which plaintiff demurred, and had judgment, but upon the issue he was *nonsuited*. And it was ordered, that the costs of the *demurrer* be taxed for the plaintiff, and so much as they should

* This certificate may be made after trial.

amount to, be deducted out of the coſts of the *nonſuit* for the defendant.

Three counts in treſpaſs, and a juſtification to each; iſſues joined, and *two* found for defendant, the *third* for plaintiff — This caſe is not within the act, and plaintiff intitled to *coſts* on the whole declaration.

In *replevin*, plaintiff pleaded two pleas, iſſues joined; one found for plaintiff, the other againſt him, and no *certificate*. Held that defendant is intitled to the coſts of the iſſue found for him.

Avowant, though not named in the act, ſeems to be within the meaning of it; if, therefore, *one* or more iſſues be found for him, and there is no *certificate* that *plaintiff in replevin* had probable cauſe to plead ſuch *double plea*, the avowant ſhall have the coſts of that iſſue which is found for him.—So avowant ſhall pay coſts on the ſpecial avowries found againſt him.

On iſſues joined on not guilty, and a *ſpecial juſtification* in *treſpaſs*, plaintiff had a general verdict, and a *penny* damages. No *certificate* that defendant had a probable cauſe to plead the *ſpecial* matter. Here it was held, that plaintiff is not intitled to the coſts of the *juſtification*. For by the *ſtat. of Anne*, when the judge does not *certify*, that defendant had probable cauſe to plead ſeveral matters, and *verdict* thereon be for plaintiff, *coſts are to be at the diſcretion of the court*. And when there is no *certificate*, on the 43 *of Eliz.* (when plaintiff recovers damages under forty ſhillings), the plaintiff ſhall not have coſts of any plea pleaded with leave of the court, although iſſue thereon be found for him, and the judge have not *certified* that defendant had probable cauſe.

The court of *King's Bench* does not allow plaintiff his coſts as to any iſſue which is found for defendant.—But the court of *Common Pleas* do allow plaintiff his coſts as to all the iſſues, if any are found for him, though one or more be found for defendant.

Where there are iſſues joined on ſeveral *counts*, and on ſome a verdict for the plaintiff, and on others for the defendant [if in *B. R.*], the defendant ſhall not have coſts on that part of the record on which verdict is found for him. For the practice of the *King's Bench* has been uniform not to allow the defendant coſts in caſes of this ſort. They differ from caſes where different iſſues are joined on different *pleas*; for in thoſe caſes the defendant is allowed his coſts on the iſſues found for him.

Of Coſts where a VERDICT OR JUDGMENT IS FOR PART, in FEIGNED ISSUES, WHERE MONEY IS BROUGHT INTO COURT, and upon AMENDMENTS.

IF in *aſſumpſit* againſt *two*, one ſuffers judgment by *default*, and the other pleads *non aſſumpſit*, and ſuch iſſue is found for him, that defendant ſhall have coſts; and as his plea went to the whole demand, plaintiff cannot have coſts of him who ſuffered judgment by *default*.

So if in *covenant* againſt two, and judgment by default againſt one, and the other pleads to iſſue, and it be found for him—he ſhall have his coſts, and plaintiff neither damages nor coſts againſt him by default.

But if judgment on demurrer be for defendant, on one count, and *verdict for plaintiff* on an iſſue to the other count, plaintiff ſhall have coſts as to the iſſue, and defendant no coſts on his demurrer.

As to Coſts on *feigned Iſſues*.

If three feigned iſſues are ordered, and there be a verdict on the material one for defendant, and on the others for plaintiff, then, if in *C. B.* plaintiff ſhall have coſts of all the *iſſues*; but it ſeems otherwiſe in *B. R.*

The rule is, that coſts upon *feigned iſſues* abide the event of the verdict; that is, if they are ordered by a court of *law*, if coſts are not mentioned in the rule ordering the *feigned iſſue*. But if a *feigned iſſue* is ordered by a court of *equity*, coſts do not follow the *verdict*, becauſe the matter goes back to equity.—However, if a *feigned iſſue* is ordered on a *criminal caſe*, coſts of the iſſue only will attend the verdict, and not the *prior coſts*—as thoſe on the rule why an *information*, or *attachment* ſhould not go.

As to Coſts, where *Money is brought into Court*.

A rule to bring money into court is ſeldom granted without annexing the condition of paying *coſts*. But on particular circumſtances, the court will grant the rule without the condition, as where a plaintiff keeps out of the way on purpoſe to avoid a tender of *rent*.

If plaintiff takes the money out of court upon a plea of *tender*, the defendant is entitled to coſts.—So if plaintiff proceeds afterwards, and then moves for leave to take the money out of court, the court will not grant it, without paying defendant his coſts ſubſequent to bringing it in.

Where

Of Costs where a VERDICT OR JUDGMENT IS FOR PART, in FEIGNED ISSUES, WHERE MONEY IS BROUGHT INTO COURT, and upon AMENDMENTS.

Where plaintiff does not take the money out of court, but proceeds, the amount of the money brought in is struck out of the declaration, and paid out of court to the plaintiff.—And though he proceeds, he will not be permitted to give evidence as to that money.—And if he does not recover more he is not entitled to *costs*.

The old form of the rule for bringing money into court, upon condition of paying costs, is in general still adhered to in the *King's Bench*. So that if plaintiff takes the money out, the costs not being paid, that court will not grant an *attachment*.—Though in such case plaintiff may proceed for want of the costs being paid, and will in case of a verdict (even for a lesser sum), be entitled to his whole costs.

Whereas in the *Common Pleas*, the old form has been so altered as to be *obligatory* on defendant to pay the *costs*; and if not paid when the money is taken out, that court will grant an *attachment*.

As to Costs upon *Amendments*.

Upon leave given to a party to *amend*, the condition of paying costs is usually annexed to the rule. But in some cases, where the amendment is for a mere *vitium clerici*, the courts will grant leave to amend without costs. However, upon the rule to amend, with the condition annexed, the courts will not suffer one party to load the other (to whom leave has been given to amend upon *condition*) with any other costs, than such as are *necessarily* occasioned by the amendment.

If leave is given to amend the record after *error* brought, it is always on paying costs *of the amendment, and writ of error*; that is, if *plaintiff* in error do not proceed afterwards. But if he do proceed, then the court will not oblige *defendant* in error even to pay the costs of the amendment; because it is evident, that plaintiff did not entirely rely upon the error which has been amended.

Of Coſts for not EXECUTING A WRIT OF ENQUIRY, DELAYING TRIAL, and not PROCEEDING TO TRIAL PURSUANT TO NOTICE.

COSTS for not executing a *writ of enquiry* purſuant to notice given, are not founded upon any ſtatute, but upon rules of the reſpective courts, "That where notice of executing a writ of enquiry is given, and not countermanded in time, defendant ſhall be entitled to coſts *, in like manner as when plaintiff does not proceed to the trial of an iſſue after notice given."

"Where any iſſue ſhall be joined in any "court of record at *Weſtminſter*, Great Seſ- "ſion of *Wales*, Great Seſſion of *Cheſter*, "*Common Pleas* of *Lancaſter*, or *Common Pleas* "of *Durham*, and plaintiff neglects to bring "ſuch iſſue to be tried, the judge or judges "of ſuch courts reſpectively may at any time "after, upon motion in court (due notice "being given thereof), give like judgment for "defendant as in caſes of *nonſuit*; unleſs ſuch "judge or judges ſhall, upon juſt cauſe and "reaſonable terms, allow any further time "for the trial of ſuch iſſue; and if the plain- "tiff ſhall neglect within the time allowed, "then ſuch judgment ſhall be given as afore- "ſaid. 14 *Geo.* 2. *c.* 17.

"*Provided*, That judgment given by this "act ſhall be of like force and effect as judg- "ments upon *nonſuit*, and of no other force "or effect.

"*Provided* alſo, That defendant ſhall upon "ſuch judgment be awarded *coſts*, where he "would have been entitled to the ſame upon "*nonſuit*."

An *executor*, although judgment as in caſe of a *nonſuit* be given againſt him, is not liable to *coſts* within this act, becauſe he could not be liable in caſe of a *nonſuit* at the trial.

It has been ſaid that judgment, as in caſe of a *nonſuit*, cannot be given on this ſtatute, unleſs all the defendants apply for it—but there ſeems no reaſon for this.

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* *Vide* the firſt volume, as to notice and countermand of executing a *writ of enquiry, trial*, &c.

A *qui*

Of Coſts for not EXECUTING A WRIT OF ENQUIRY, DELAYING TRIAL, and not PROCEEDING TO TRIAL PURSUANT TO NOTICE.

A *qui tam* action is within this ſtatute.

Defendant in *replevin* ought not to have judgment as in caſe of a *nonſuit*, being himſelf an actor. [*Vide* more under title, "Judgment, as in caſe of a *nonſuit*, for not proceeding to trial," in the firſt volume.]

By rules 1654, if plaintiff give notice of trial, and do not proceed, defendant upon motion is to have the *coſts* of his attendance—unleſs plaintiff give warning in convenient time, or ſhew cauſe in excuſe; but, to aſcertain the time, it was enacted,

"That in caſe any party ſhall have given notice of trial at any *aſſize*, or at any ſitting in *London* or *Weſtminſter*, where the defendant lives 40 *miles* from the ſaid cities reſpectively, and ſhall not afterwards countermand the ſame in writing, at leaſt *ſix days* before ſuch intended trial, every ſuch party ſhall be obliged to pay the like *coſts and charges* as if ſuch notice had not been countermanded." 14 *Geo.* 2. *c.* 17. *ſ.* 5.

By rules 1654 it was ſettled, that in cauſes in *London* and *Middleſex*, if defendant lived within *forty miles*, *eight* days notice muſt be given; if defendant lives above *forty miles*, then *fourteen days* notice; but the ſtatute 14 *Geo.* 2. enacted, that *ten days* notice at leaſt muſt be given, whether in *town or country*; and as there are not negative words in it, the old practice of giving *fourteen days* is ſtill adhered to, when defendant reſides *above forty miles* from town.

Within this ſtatute a defendant is liable to coſts for not proceeding to trial by *proviſo*, purſuant to notice.

The firſt part of this ſtatute gives judgment as in caſe of a *nonſuit*, and coſts againſt plaintiff for not proceeding to trial after iſſue joined—the latter gives *coſts* for not proceeding to trial, purſuant to notice, not countermanded in time.

So that if plaintiff neglects to go to trial after iſſue joined, defendant may move for judgment, as in caſe of a *nonſuit* againſt him. And if he neglects to try after notice not countermanded, defendant may apply for his *coſts* in not proceeding to trial. But defendant cannot have both remedies, the *coſts* as of a nonſuit, and the *coſts* of not going to *trial*; but muſt make his election of one or the other.

Of Coſts for not EXECUTING A WRIT OF ENQUIRY, DELAYING TRIAL, and not PROCEEDING TO TRIAL PURSUANT TO NOTICE.

An *executor or adminiſtrator* is not liable to pay *coſts* upon a judgment againſt him as in caſe of a *nonſuit* [becauſe upon a *nonſuit*, if he was obliged to ſue as executor or adminiſtrator, he would not be liable to pay coſts]; but he ſhall pay coſts for not proceeding to trial purſuant to his notice. So he ſhall pay *coſts* of a *nonproſs*.

One admitted to ſue in *formâ pauperis* does not pay coſts for not going to trial. For he pays no coſts unleſs upon a *nonſuit*, or where a verdict is found againſt him, and then he ſhall pay coſts, or be whipped. See the ſtat. 23 *of Hen.* 8. *c.* 15.

If plaintiff gives notice of trial, and neglects to enter his cauſe in due time, and defendant enters a *ne recipiatur*, to prevent his entering it afterwards, defendant is entitled to his coſts for plaintiff's not proceeding to trial, becauſe plaintiff is guilty of a default.

If plaintiff gives notice of trial, and defendant alſo gives notice of trial by *proviſo*, and neither goes to trial, both ſhall pay coſts.

And if defendant has obtained *coſts* for not going to trial, and plaintiff gives notice a ſecond time, without paying ſuch coſts, on motion, the proceedings will be ſtayed till thoſe coſts are paid.

But coſts for not proceeding to trial will not be allowed, where plaintiff is guilty of no *wilful laches*; as where he is prevented from proceeding, from ſome unforeſeen accident to his witneſſes; for theſe coſts are only founded upon *neglect*: nor will defendant be entitled to coſts in ſuch caſe, when plaintiff's delay ariſes from defendant's own neglect, as from his not attending to ſtrike his twelve out of a panel of *forty-eight ſpecial jurors*.

Vide ſeveral caſes under the above title in the firſt volume.

Of

Of Coſts of WITNESSES—where a REPLEADER is awarded—where A SPECIAL JURY—and where A NEW TRIAL.

THE *Common Pleas* allow coſts of a material witneſs who attended, though he was neither *ſubpœna'd* nor examined; but the *King's Bench* do not allow coſts of any witneſs, however material, if he was neither *ſubpœna'd* nor examined.—But in both courts the coſts of a material witneſs, who was examined, though not *ſubpœna'd*, will be allowed, as will the coſts of ſuch witneſs *ſubpœna'd*, though he never attended.

As to coſts where a *repleader* is awarded, the rule is to allow coſts to neither party, becauſe both are guilty, the one in tendering an *immaterial plea*, the other in *joining iſſue* upon it.

" The party who applies for a *ſpecial jury*, " ſhall pay the fees for ſtriking the ſame, and " not be allowed them on taxation of coſts." 3 *Geo.* 2. *c.* 25. *ſ.* 16.

This ſtatute only extending to the *fees* for ſtriking a *ſpecial jury*, the courts held, that the other coſts relative to ſuch jury ſhould attend the *verdict*; but as this was frequently burthenſome and oppreſſive, it was afterwards enacted,

" That the party applying for a *ſpecial* " *jury* ſhall alſo pay the expences thereof; " and ſhall have no further allowance for " the ſame, than he would be entitled to in " caſe of a *common jury*; unleſs the *judge* af- " ter trial ſhall immediately *certify* in court, " upon the back of the record, that the " cauſe was proper to be tried by a *ſpecial* " *jury*." 24 *Geo.* 2. *c.* 18.

Coſts of a former trial, when a *new trial* is ordered, are in the diſcretion of the court, and wholly depends upon circumſtances.

When a *new trial* is granted for any other cauſe than upon the *merits*, coſts are uſually ordered to abide the event of the *new trial*; when granted upon the *merits* of the cauſe, the condition of paying the coſts of the former trial is uſually annexed.

But if a plaintiff refuſes to be *nonſuit*, contrary to the opinion of the judge, a new trial (if granted) ſhall be *without coſts*. So where he ſubmits to a *nonſuit*, in compliance with the erroneous opinion of a judge, the nonſuit ſhall be ſet aſide *without coſts*.

Of

Of Costs where the Cause is made a REMANET, or goes off by CONSENT, or is referred to ARBITRATION.

WHERE the cause was made a *remanet* to another *assizes*, the *Common Pleas* used to allow only the costs of attending the latter assizes: whereas the *King's Bench* allowed the costs of both.—The practice of the *Common Pleas*, however, in this particular, agrees now with that of the *King's Bench*.—And it is held in both courts (though formerly otherwise), that in all cases where a cause goes down to trial, and goes off upon any occasion without fault, contrivance, or management of either party, and is afterwards brought to trial, the costs of such former abortive going to trial, shall be taxed and allowed, to the party *finally* prevailing, as if the cause had gone off on a *remanet*.

Arbitrators, under an order of *nisi prius*, have a power to award *costs* of the *suit*, as well as of the *arbitration*. But if they only award *costs* generally, costs of the reference ought not to be allowed on the taxation, but only the costs of the suit.

Arbitrators, if the reference be under a bond for submitting to an award, cannot award costs subsequent to the bond; though under an order of *nisi prius*, they may award costs subsequent to the reference. But arbitrators, under a reference without an order, can only award costs to the time of the reference.

However, if a verdict is taken for a certain sum for securing the damages and costs, upon an order of reference at *nisi prius*, and the arbitrator ascertains the damage, he cannot award the same to be paid *without costs*, because contrary to the order.

Of staying Proceedings till a responsible Plaintiff, or Security given for Costs.—Of staying a second Action till Costs of a former are paid; and of deducting the Costs of one Action out of another.

THE practice of granting a rule to *ſtay proceedings till a reſponſible plaintiff be named, or ſecurity given for coſts*, holds but in two caſes, viz. *ejectment*, and *qui tam* actions.—In *ejectment*, when it is on the demiſe of an infant, or when the leſſor of plaintiff happens to die, or when the leſſor of plaintiff reſides abroad, or when the action for *meſne profits* is brought in the name of the nominal plaintiff.—In a *qui tam*, when plaintiff's reſidence is not known, or he appears to be a fictitious perſon. —But in no other caſe will the courts grant ſuch rule; not even if it appears, that plaintiff is a *foreigner* reſiding abroad, or a perſon reſident in *Scotland*; who, as to our courts, is the ſame as a *foreigner*.

And as to the practice of granting a rule to *ſtay proceedings in a ſecond action till the coſts of a former are paid*, that alſo holds good only in *ejectment*; except in ſome caſes under particular circumſtances, as where the ſecond action appears quite vexatious, and when the merits have been fully and impartially tried on the firſt.

In *ejectment*, the courts will grant ſuch rule, as well when the ſecond action is brought in a different court, as in the ſame. And as well where there was a *nonſuit* in the former action, or a *non-proſs*, as where the merits have been tried; and even if the plaintiff unneceſſarily haraſſes or vexes the defendant.—But if leſſor of plaintiff is in cuſtody under an *attachment*, for non-payment of the former coſts, no ſuch rule will be granted, becauſe ſuch *attachment* is in nature of a *ca. ſa.*—Nor will they grant ſuch rule for plaintiff, when a defendant, againſt whom a verdict in the former action was had, brings a new ejectment himſelf.

A rule was made to ſtay proceedings in a ſecond action, brought by a *peer*, who refuſed to pay the coſts of a former *nonſuit* for the ſame cauſe.

It is now univerſally admitted, that the court may make a rule in croſs actions, *for deducting the coſts of one action out of another*; and ſuch rule has been granted in ſeveral inſtances, eſpecially ſince the *ſtatutes* of *ſet-off*; being founded in reaſon, juſtice, and equity.

Of

Of Coſts where Plaintiff ſues in FORMA PAUPERIS, and where AN INFANT SUES BY GUARDIAN OR PROCHEIN AMI.

THE ſtat. 23 *Hen.* 8. *c.* 15. enacts, that *paupers* being plaintiffs, ſhall have proceſs and counſel of charity, and not be compelled to pay *coſts*, but ſhall ſuffer other puniſhment, at the diſcretion of the judges.

While the plaintiff continues to ſue in *forma pauperis* under the admiſſion of the court, he is not liable to coſts, unleſs upon a *nonſuit*, or *verdict*, and then he ſhall pay coſts or be whipped; but if he is vexatious, as not proceeding to trial purſuant to notice, or the like, defendant may move to have him *diſpaupered*, and then he will be ſubject to *coſts*.

An infant, ſuing by guardian or *prochein ami*, is not liable to coſts, as ſaid in *Cro. Eli.* 33. and *Stra.* 708.—But in 1 *Barnes*, 105. held, that the *prochein ami* of an infant is liable to coſts: and if it appears, that the *prochein ami* named is not of ſufficient ability to pay coſts, the court, on application, will order another to be named.—But an infant defendant, defending by *guardian*, pays coſts if verdict paſs againſt him.

Of Coſts where PLAINTIFF SUES OR DEFENDS AS EXECUTOR or ADMINISTRATOR.

PLAINTIFFS ſuing as *executors* or *adminiſtrators* are not within the ſtatutes giving coſts to *defendant*.—But *executors* and *adminiſtrators*, when *defendants*, pay coſts in all caſes as other defendants.—And the judgment as to coſts, is, *de bonis teſtatoris ſi*, &c. *et ſi non tunc pro miſis de bonis propriis*.—And they ſhall have *coſts*, when as defendants judgment is given for them *.

But when they are plaintiffs, they pay coſts of a *nonproſs*, or *for not going to trial* purſuant to notice, becauſe they are guilty of a *laches*—but not if *nonſuited at the trial*, or if judgment paſs againſt them, as in caſe of a *nonſuit*; or if *they withdraw the record before trial*.

Upon a *diſcontinuance* by an *executor* or *adminiſtrator*, it is diſcretionary in the court to give leave, with or without paying coſts; but if it appears, that they *knowingly* brought their action wrong, the court will annex the condition *upon payment of coſts*, to the rule to diſcontinue.

Note, As to *executors* or *adminiſtrators* paying coſts when plaintiffs, the uniform rule is, that when they can ſue in their own right, and yet bring the action *quatenus executors* or *adminiſtrators*, and fail therein, they ſhall pay coſts as other perſons; but if they could not bring the action otherwiſe than as *executors* or *adminiſtrators*, though they fail therein, *not through their own default*, they ſhall not pay coſts. For *executors and adminiſtrators* are not excuſed from paying coſts by the letter of the ſtatutes, but by a very favourable conſtruction thereof; as being preſumed to have no knowledge of the affairs of their teſtators. As in *aſſumpſit* by an *executor*, for money had and received to his uſe as *executor*, if he be nonſuited, he ſhall not pay coſts; for he could not ſue but as *executor*, and it is not material whether the money was received by the defendant ſince the teſtator's death or before.—But if he bring *trover* and *converſion*, for a trover and converſion in his own time, and be nonſuited, then he ſhall pay coſts, for in ſuch caſe he need not name himſelf *executor*; and the goods are aſſets in the executor's hands, though he never recover them.

So that if an executor or adminiſtrator is obliged to ſue as ſuch, he pays no coſts, but in the caſes of a *nonproſs* or *for not going to trial*: But if in ſuch action defendant pays money into court, then plaintiff proceeds at his peril as to coſts.

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* Executors or adminiſtrators may make themſelves liable to the *debt* or *damages*. *de bonis propriis*, as well as to the *coſts*—as if they plead a plea, which of their own knowledge is falſe; or if they do a fraudulent act to ouſt the creditor, and theſe be found againſt them.

Of

Of Coſts where OFFICERS are DEFENDANTS, and where OFFICERS are PLAINTIFFS.

PERSONS acting under the authority of the 43 *of Eliz.* to ſuits brought againſt them, may plead *not guilty*, or make *avowry*, *cognizance*, or *juſtification*; and if there ſhall be a *verdict for them*, or plaintiff be *nonſuited*, defendants ſhall recover *treble damages with coſts*.

If the jury neglect to *aſſeſs* the damages, or aſſeſs only ſmall damages, a *ſuggeſtion* to entitle defendant to *treble damages and coſts* may be entered afterwards upon the roll.

" If any action upon the *caſe* *, *treſpaſs*, " *battery*, *or falſe impriſonment*, be brought " againſt any *juſtice*, *mayor*, or *bailiff*, of a " city or town corporate, *headborough*, *port-* " *reeve*, *conſtable*, *tything-man*, or *collector*, it " ſhall be lawful for all ſuch, and others, " acting in their aid, aſſiſtance, or by their " commandments, to plead the general iſſue, " and give the ſpecial matter in evidence; " and if ſuch amounts in law to a diſcharge, " and *verdict* ſhall paſs for defendants, or " plaintiff becomes *nonſuit*, or ſuffers a *diſ-* " *continuance*, the juſtice, judge, *&c.* before " whom the matter ſhall be tried, ſhall allow " defendants *double coſts*." 7 *Jac.* 1. *c.* 5.

The benefit of this act is extended to *churchwardens*, *ſwornmen*, and *overſeers of the poor*, and others acting in their aid, *&c.* by 21 *Jac.* 1. *c.* 12. *ſ.* 2.—And theſe acts extend to deputy conſtables, and perſons acting under a warrant.

If *verdict* paſs for defendant, he muſt get a *certificate* from the judge, that the action was brought againſt him for ſomething done in the *execution of his office*, in order to entitle him to *double coſts* under theſe acts.

But to entitle the officer to *double coſts*, he muſt get a certificate from the judge, that the action was brought againſt him for ſomething done in the execution of his office.

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* This means only actions on account of ſome *temporal act done*, and whereto defendant is enabled to plead the *general iſſue*; but it don't extend to a *nonfeaſance*, as for not admitting a perſon to vote, or for a malicious preſentment in an Eccleſiaſtical Court, or the like.

Of Coſts where Officers are Defendants, and where Officers are Plaintiffs.

On the other hand, many ſtatutes give coſts againſt officers proſecuting ſuits, or informations upon a ſeizure of goods, if they fail therein; to which ſtatutes I muſt refer the reader, with this remark, that all ſtatutes inflicting coſts are conſtrued ſtrictly.

By the 24 *Geo.* 2. *c.* 44. No writ is to be ſued out againſt any juſtice of peace, for what he ſhall do in the execution of his office, till notice given, or left at his place of abode, of the cauſe of action, at leaſt one month before writ ſued out.—And no action brought againſt a conſtable, acting in obedience to a juſtice's warrant, or perſon acting by his order, or in his aid, till demand made of the copy of the warrant, and refuſal or neglect to give the ſame for ſix days.—If the demand is complied with, and action brought againſt conſtable, *&c.* without making the juſtice a party, then on producing the warrant at trial, the jury ſhall give a verdict for defendant.—Or if the action be brought jointly, on producing, or proof of the warrant, the jury ſhall find for the conſtable, *&c.*—If a verdict paſs for the plaintiff againſt the juſtice, plaintiff ſhall recover *coſts* ſufficient to include the coſts which plaintiff is to pay the conſtable, *&c.*—And if plaintiff obtain a verdict, and the judge certify in open court, on the back of the record, that the injury was wilfully and maliciouſly committed, the plaintiff ſhall have *double coſts*.

Of Coſts, where Plaintiff ſues as COMMON INFORMER, PROSECUTOR QUI TAM, or as PARTY GRIEVED.

COMMON informers, or proſecutors *qui tam* (who are looked upon as common informers), are in no caſe entitled to coſts, unleſs coſts are given by the ſtatutes on which they ſue. And as they could not recover coſts otherwiſe, it followed, that if they were *nonſuited*, or if *defendant had a verdict* paſs for him, he could not have coſts for the vexation (unleſs the ſtatute intitled plaintiff to coſts), either by the ſtatutes 23 *Hen.* 8. or 4 *Jac.* 1. becauſe neither of theſe ſtatutes give coſts to defendant, except in ſuch actions wherein plaintiff might have recovered *coſts*. But to redreſs diſorders in *common informers*, it was enacted,

"That if any *ſuch informer*, or plaintiff, "ſhall *willingly delay* his ſuit, or ſhall *diſcon-* "*tinue*, or be *nonſuit* *, or ſhall have the "trial or matter paſs againſt him by *verdict*, "or *judgment of law*, ſuch informer, or plain- "tiff, ſhall yield, ſatisfy, and pay unto the "party defendant, his *coſts*, *charges*, *and da-* "*mages*, to be aſſigned by the court in which "the ſame ſuit ſhall be attempted; for reco- "very and execution whereof, ſuch defend- "ant ſhall have his *ca. ſa. fi. fa.* or *elegit* to "be awarded unto him, as in other caſes of "execution. 18 *Eliz. c.* 5. *ſ.* 3. *fig.* 3 & 4.

"Provided, that this ſtatute ſhall not ex- "tend to any *officer*, who in reſpect of his of- "fice, has heretofore uſed to ſue upon penal "laws, nor to officers ſuing for matters only "concerning their office."

This ſtatute extends to one ſuing, as well on a repealed ſtatute, as on a ſtatute in force, for the vexation is the greater: ſo it extends to one ſuing on a ſtatute in a court not having juriſdiction.

And it extends, as well to *ſubſequent* penal ſtatutes, as thoſe which were in being when it was made.

It was formerly held, that *informers qui tam, pro domino rege, &c.* if *they were nonſuited, diſcontinued, or delayed* their ſuit, or

* So, if plaintiff enters a *noli proſequi*, it comes within the ſtatute.

Of Cōſts, where Plaintiff ſues as COMMON INFORMER, PROSECUTOR QUI TAM, or as PARTY GRIEVED.

had *verdict*, or *judgment of law* (in which judgment upon *demurrer* and *arreſt of judgment* are included) paſs againſt them, ſhould pay coſts on this ſtatute, if the ſtatute on which they ſued gives them coſts if they had prevailed. Although objected that the king, who was entitled to a *moiety*, pays no coſts, becauſe ſuch actions are not to be conſidered as proſecutions by the king, although he is to have a moiety.

But it has lately been held [vide *Cowp.* 366.], that a *qui tam* informer, if nonſuited, ſhall pay coſts on this ſtatute, though the ſtatute on which he ſues gives no coſts if he had prevailed, as an informer *qui tam* on the ſtatute 21 *of Hen.* 8. *c.* 13. for non-reſidence.—For the object of this ſtatute of *Elizabeth* was to prevent vexation in common informers; and therefore in that reſpect there is no diſtinction between a common informer *qui tam*, and one who is entitled to the whole penalty. For he may be juſt as vexatious when he proſecutes on behalf of the king and himſelf jointly, and when he ſues on his own ſeparate account.

This ſtatute, however, does not extend to actions on *penal ſtatutes*, by the *party grieved*;—ſo that under this ſtatute, the defendant ſhall not, in the caſes before mentioned, have coſts of ſuch party.—But under the 4 *Jac.* 1. *c.* 3. a defendant ſhall have coſts of ſuch *party grieved*; if by the ſtatute, the party grieved would have been entitled to coſts had he prevailed.

The *party grieved*, we have ſeen, may recover coſts [under the ſtatute of *Glouceſter*] in ſome caſes, upon *penal ſtatutes*, although coſts are not mentioned in the ſtatute on which he ſues. As if he ſues on the *Riot Act*, 9 *Geo.* 1. for burning or demoliſhing his houſe, if he recover he ſhall have coſts; becauſe, before the *ſtatute of Glouceſter*, in ſuch caſe he would have been entitled to *damages*. So on that ſtatute, if the party grieved fails, he ſhall pay *coſts*. But if the duty is uncertain as to recover treble *damages*, as upon *the ſtatute of waſte*, or *ſtatute* 2 *Edw.* 6. for not ſetting out tythes, there plaintiff ſhall not have any coſts.

But, if in a ſubſequent ſtatute a penalty is given to a *common informer*, and the party grieved happen to bring the action, he muſt bring it as *common informer*; and if no *coſts* are given by ſuch ſtatute, he ſhall recover no coſts.

Of Double or Treble Coſts.

PLAINTIFFS may recover *double* or *treble coſts*, as well as double or treble damages, given by a ſtatute, though the ſtatute makes no mention of coſts, provided that *damages* were recoverable in ſuch action before the *ſtatute of Glouceſter*.

For inſtance, by 2 *Hen.* 4. *c.* 1. *double damages* are given to a plaintiff, who has been ſued in the *admiralty* for a thing done on land, and no mention is made of *coſts*.—Now, if plaintiff prevails in an action founded on this ſtatute, beſides his *double damages*, he ſhall have *double coſts*. Becauſe, at *common law*, an action lay for ſuing in a court, not having juriſdiction.

So the 8 *Hen.* 6. *c.* 9. gives *treble damages* for a *forcible entry*, and is ſilent as to coſts; but on this ſtatute, if plaintiff prevails he ſhall have *treble coſts*.

So, for a *reſcue* on the 2 & 3 *W.* & *M. c.* 5. *treble damages are given*; and becauſe *ſingle damages* in ſuch caſe were recoverable at *common law*, there ſhall be *treble coſts* alſo.

On the other hand, if a ſubſequent ſtatute gives *damages*, *double* or *treble*, and is ſilent as to *coſts*; if no damages were recoverable in the action before the ſtatute of *Glouceſter*, the plaintiff prevailing, though he ſhall have ſuch damages as are given, whether *double* or *treble*, yet he ſhall have no *coſts*.

As in an action on 1 & 2 *P.* & *M.* for driving a diſtreſs out of the hundred, *five pounds* penalty and *treble damages* are given, but no *coſts*. *Ergo*; upon that ſtatute, no coſts are recoverable, becauſe there is no mention of coſts; and no *damages* were recoverable in ſuch caſe at *common law*.

The diſtinction taken in the books is this: Whereſoever a ſtatute ſubſequent to the ſtatute of *Glouceſter* increaſes damages to the *double* or *treble* value, where damages were *before given*, the plaintiff ſhall recover coſts, and thoſe *coſts* ſhall alſo *be doubled or trebled*, as the ſtatute may be. But where *ſingle*, *double*, or *treble* damages are *newly* given by ſuch ſubſequent ſtatute, where no *damages were formerly recoverable*, there the plaintiff ſhall recover thoſe damages only, and *no coſts*; becauſe the ſtatute of *Glouceſter* does not operate to add coſts, to what is given by ſuch ſubſequent ſtatute. Vide *Cowp.* 368.

Where a ſtatute gives *double or treble coſts* to certain perſons, if they prevail in ſuits brought againſt them for matters done in their office, if leave is given to plaintiff to *diſcontinue* in his action againſt them, the court may inſert the condition as to the payment of coſts in the rule.—If the plaintiff is *nonſuited* before defence made, by ſuch officer, *&c.* then the way is, to enter a ſuggeſtion on the roll, with leave of the court, to en-

Of Double or Treble Coſts.

title the party to his *double* or *treble* coſts.—But if a *verdict* paſs for ſuch defendant at the trial, then the judge ought to indorſe on the *niſi prius* record, that defendant was ſued for a matter done in his office to entitle him to ſuch coſts.

Double or *treble* coſts, mean double or treble coſts *de incrementó.*

Of

Of Coſts in Replevin.

IN *replevin*, and the action of *ſecond deliverance*, being a ſpecies of the action of *treſpaſs*, damages were recoverable by Plaintiff before the ſtatute of *Glouceſter*; ergo, ſince the making of that ſtatute *coſts* are recoverable alſo. But *avowants*, or *defendants in replevin*, for a long time could recover no *coſts*. However, it was enacted,

"That every *avowant*, and *perſon or perſons* making avowry, cogniſance, or juſtifying as baily to any perſon in *replegiari*, or *ſecond deliverance*, for rent, cuſtom, or ſervice, if their avowry, cogniſance, or juſtification be found for them, or plaintiffs in the ſaid actions be otherwiſe barred, ſhall recover their *damages and coſts*, as the plaintiffs ſhould have done, if they had recovered." 7 *Hen.* 8. *c.* 4. *ſ.* 3.

The foregoing ſtatute only mentioning *rent*, *cuſtom*, or *ſervice*, was extended to "perſons "avowing, making cogniſance, or juſtifying *for damage feaſant*, *or for other rent or* "*rents*, upon any diſtreſs taken in any lands "or tenements; and if the ſame avowry, "cogniſance, or juſtification, be found for "them, or the plaintiffs in the ſame be non-"ſuit, or otherwiſe barred, then they ſhall "recover their damages and *coſts* againſt the "ſaid plaintiffs, as the ſame plaintiffs ſhould "have done or had, if they had recovered." 21 *Hen.* 8. *c.* 19. *ſ.* 3.

Theſe ſtatutes give *damages and coſts* only to perſons avowing, making cogniſance, and juſtifying for *rents*, *cuſtoms*, *ſervices*, or for *damage feaſant*. So that they don't extend to an avowry for a *nomine pœnæ*, or for an *eſtray*; and therefore if in ſuch caſes *damages and coſts* were given, the judgment muſt be reverſed on error being brought.

Executors and *adminiſtrators* having power of making avowry [*by the* 32 *Hen.* 8. *c.* 37.], although ſuch power was given them ſubſequent to the above ſtatutes, are nevertheleſs held to be entitled to coſts under them.

If plaintiff has judgment againſt him upon a *plea in abatement*, defendants, although they make *ſuggeſtion* for a return, are not entitled to *coſts*.

But

Of Coſts in Replevin.

But a defendant avowing for an *amercement* by a court leet is.

But if avowant in replevin plead *property*, he cannot recover coſts under theſe ſtatutes.

" If plaintiff is nonſuited before iſſue join-
" ed, defendant may have a writ of enquiry;
" or in caſe he be nonſuit after iſſue joined,
" or verdict paſs againſt him, the jury may
" enquire concerning the ſum of the arrear-
" ages of *rent*, and value of the goods and
" cattle diſtrained; and thereupon *avowant*,
" *or perſon making cogniſance*, ſhall have judg-
" ment for the arrearages, or ſo much as the
" goods or cattle amount unto, with *full coſts*
" of ſuit.—So if defendant avowing or making
" cogniſance for *rent* have judgment on de-
" murrer."

17 *Car.* 2. *c.* 7. *ſ.* 2.

" Laſtly, perſons may avow or make cog-
" niſance *generally* (without ſetting out title
" for rent, relief, heriot, or other ſervice
" diſtrained for). And if plaintiff in ſuch
" action ſhall become *nonſuit*, diſcontinue, or
" have judgment againſt him, defendant ſhall
" recover *double coſts*."

11 *Geo.* 2. *c.* 19. *ſ.* 22.

In *replevin*, both plaintiff and defendant are actors, therefore either party may carry down the cauſe; and if the defendant give notice, and do not go on to trial, the court will give coſts againſt him—for the ſame reaſon defendant may not move for judgment of *nonſuit*, unleſs the plaintiff have given notice of trial.

If the defendant avowing for *damage feaſant* has a verdict, he has a *retorno habendo* for the cattle, and a *ca. ſa.* for the damages, *&c.* but if the party tender the coſts and damages, the ſheriff, after ſuch tender, ought not to execute the *retorn' habend'*—But if, for want of ſuch tender, he does, and afterwards they are paid the party, upon ſuggeſting that the coſts, *&c.* are paid, may have a writ "*ſi conſtare poterit*, &c." for reſtitution of the diſtreſs.

Of

Of Coſts in WASTE, FOR NOT SETTING FORTH TYTHES, in SCIRE FACIAS, and PROHIBITION.

AT common law, an *action of waſte* lay againſt tenant in *dower*, or a *guardian*—and (as it ſeems) *tenant by the courteſy*; therefore as *damages* were recoverable in ſuch action, by the *ſtatute of Glouceſter*, *c.* 1. they ſhall have *coſts* alſo.—And in the above caſes, *defendant* ſhall have coſts alſo of plaintiff if he fails, under the ſtat. 4 *Jac.* 1.

The ſtatute of *Glouceſter*, *c.* 5. however extended the action of *waſte* to him that holdeth by the law of *England*, or otherwiſe for term of life, or for years, or a woman in dower, and enabled plaintiff to recover the thing waſted, and *treble damages*. But as no mention was made of *coſts*, coſts were not recoverable againſt tenant *for life, or years*, in waſte, till it was enacted,

" That in all actions of waſte, the plain-
" tiff obtaining judgment, or any award of
" execution after plea pleaded, or demurrer
" joined, ſhall recover *coſts*; and if plaintiff 8 & 9 *W.* 3.
" be *nonſuit*, or ſuffer diſcontinuance, or if *c.* 11, *ſ.* 3.
" a verdict paſs againſt him, defendant ſhall
" recover his *coſts*, and ſhall have execution
" for the ſame by *ca. ſa. fi. fa.* or *elegit*."

As to not ſetting out *tythes*, no action lay for ſuch neglect till the 2*d* & 3*d of Edw.* 6. which gave no *coſts*, ſo no coſts were recoverable therein; not by plaintiff, becauſe no *damage* in ſuch action before the ſtatute of *Glouceſter*; not by defendant under the 4 *of Jac.* 1. becauſe none recoverable therein by plaintiff. But to remedy this,

" In all actions for not ſetting forth tythes,
" wherein the ſingle value or damages found
" by the jury, ſhall nor exceed *twenty* *
" *nobles*, the plaintiff obtaining judgment,
" or any award of execution, after plea 8 & 9 *W.* 3.
" pleaded, or demurrer joined, ſhall reco- *c.* 11. *ſ.* 3.
" ver his *coſts*; and if he become *nonſuit*,
" *diſcontinue*, or *have verdict againſt him*, de-
" fendant ſhall recover his *coſts*, and have exe-
" cution by *ca. ſa. fi. fa.* or *elegit*."

* A noble is 6 *s.* 8 *d.*——*Twenty* make 6 *l.* 12 *s.* 4 *d.*

Of Coſts in WASTE, FOR NOT SETTING FORTH TYTHES, in SCIRE FACIAS, and PROHIBITION.

Damages not being recoverable in *ſcire facias*, no coſts could be recoverable therein; none by plaintiff under the ſtatute of *Glouceſter*, or other ſtatute; and none by defendant under the 4 *Jac.* 1. becauſe plaintiff could recover no damages in a *ſcire facias* before. But to remedy this,

"In all ſuits upon writs of *ſcire facias*, the "plaintiff obtaining judgment, or any award "of execution after plea pleaded, or de- "murrer joined, ſhall recover his *coſts*; and "if he become *nonſuit*, *diſcontinue*, or *have* "*verdict againſt him*, defendant ſhall recover "his coſts, and have execution by *ca. ſa. fi. fa.* or *elegit*." 8 & 9 *W.* 3. *c.* 11. *ſ.* 3.

Upon quaſhing a *ſcire facias* by plaintiff himſelf, or upon a *plea in abatement* to a *ſcire facias*, if plaintiff moves for leave to quaſh his writ, he ſhall not pay coſts; becauſe the law is the ſame in *ſcire facias* as in that of any other writ; in which, if the writ be abated, plaintiff is not liable to coſts.

Executors or adminiſtrators [defendants] in a ſuit upon *ſcire facias*, are not liable to pay coſts to plaintiff, if he prevails, nor ſhall they when *plaintiffs* in *ſcire facias* pay coſts, when defendant prevails.

The ſtatute 2*d* & 3*d of Edw.* 6. *c.* 13. preſcribes a way for any party ſuing for a *prohibition*, to any ſuit in the king's *eccleſiaſtical courts* for tythes, or offerings in any of the king's courts, where prohibitions have been uſed to be granted; and ordains, in caſe the *ſuggeſtion* be not proved true in the court where the prohibition ſhall be granted *within ſix months after*, that then the party hindered of his ſuit in the *eccleſiaſtical court* by the *prohibition*, ſhall upon requeſt, without delay, have a *conſultation* granted, and ſhall recover *double coſts and damages* againſt the party who had ſued the prohibition; the ſaid coſts and damages to be aſſeſſed by the court where the *conſultation* ſhall be granted; for which coſts and damages the party may have an action of *debt*.

It is not neceſſary, that the *ſuggeſtion* ſhould be proved preciſely; for if it appears from the proof, that the *eccleſiaſtical court* ought not to hold plea of the matter, that is ſufficient. Nor need the *ſuggeſtion* be proved within the ſix months, when the party is ordered to *declare*, for then the proof is to be at the trial.

Defendant

Of Coſts in WASTE, FOR NOT SETTING FORTH TYTHES, in SCIRE FACIAS, and PROHIBITION.

Defendant is not entitled to *double coſts* under this ſtatute, for want of proving the ſuggeſtion within ſix months, unleſs a *conſultation* be granted.

Coſts by this ſtatute are only given to defendant in *prohibition*, when plaintiff fails in proving the ſuggeſtion. But no coſts were given to plaintiff in any caſe, nor to defendant in any other caſe, till it was enacted,

" That in all ſuits upon *prohibition*, the " plaintiff obtaining judgment, or any award " of execution, after plea pleaded, or de- " murrer joined, ſhall recover his *coſts*; and " if plaintiff ſhall become *nonſuit*, *diſcontinue*, " or *have verdict againſt* him, the defendant " ſhall recover his coſts, and have execution " by *ca. ſa. fi. fa.* or *elegit*." 8 & 9 *W.* 3. *c.* 11. *ſ.* 3,

It has been held that *coſts*, under this ſtatute, ſhall be taxed from the *ſuggeſtion*, ſo as to take in the coſts of the motion. But in a late caſe in the *Common Pleas*, it was held, that coſts ſhall be only from the time of making the rule for the writ of *prohibition* abſolute.

The ſtatute only extends to caſes after *plea* pleaded, or *demurrer* joined: but if plaintiff have *judgment* as to part of what is in iſſue, he is entitled to his *coſts*, although defendant have a *conſultation* as to the reſidue.—So, if defendant obtains a verdict for part, he is entitled to coſts.

Of Coſts in Error.

THE firſt mention of *coſts* in *error* is in the 3 *of Henry* 7. when it was enacted, that

" If any defendant or tenant, or any " other bound by any judgment, before exe- " cution, ſue any writ of error to reverſe " ſuch judgment, in delay of execution; that " then, *if the ſame judgment be affirmed*, or " the writ of error *diſcontinued*, or party ſuing 3 *Hen.* 7. *c.* 10. " error be *nonſuited*:—the perſon againſt " whom it is ſued ſhall recover his *coſts and* " *damages*, for his delay and wrongful vexa- " tion, by diſcretion of the juſtices before " whom the ſaid writ of error is ſued."

As there are no damages in a writ of *error*, but only a reverſal or affirmance of the judgment, this ſtatute was made to redreſs the miſchief that aroſe from writs of error to delay execution.

But as it only gives *coſts* to *defendant in error* when the writ was brought *before* execution, it was provided,

" That no execution ſhall be ſtayed upon " *error* brought in certain caſes [*vide ante*, " *title Bail in Error, where requiſite*], unleſs " plaintiff in error put in *bail* for double the " ſum recovered to proſecute the writ of error " with effect; and alſo to ſatisfy and pay, if 3 *Jac.* 1. *c.* 8. " judgment be affirmed, the debt, damages, " and coſts adjudged upon the former judg- " ment; and alſo all *coſts and damages* to be " awarded for delaying execution."

It is now held, that *coſts* are recoverable on *error* if judgment be affirmed, notwithſtanding *coſts* were not recoverable in the original action.

Executors or adminiſtrators bringing error, are not liable to coſts, unleſs charged with a *devaſtavit*, or the judgment be againſt them *de bonis propriis*.

" If any perſon proſecute *error* for reverſal " of judgment *after a verdict* in any court 13 *Car.* 2. *ſt.* 2. " of record at *Weſtminſter*, counties palatine, *c.* 2. " or great ſeſſions in *Wales*, and the ſaid

" judgment

Of Coſts in Error.

" judgment be affirmed, ſuch perſon ſhall " pay to defendant in error, *double coſts*, to " be aſſeſſed by the court, where ſuch writ " of error ſhall be depending *for the delay of* " *execution*." 13 *Car.* 2. *ſt.* 2. *c.* 2.

The above ſtatutes only extending to the caſes of *affirmance of judgment*, *nonſuit*, or *diſcontinuance*; it was enacted, for preventing vexation by defective writs of error,

" That upon quaſhing of any *writ of* " *error* for variance from the record, or " other defect, the defendant ſhall recover, " againſt the plaintiff iſſuing ſuch writ, his " *coſts* as he ſhould have had if judgment be " affirmed." 4 & 5 *Anne*, *c.* 16. *ſ.* 25.

Defendant in error ſhall be allowed the coſts of his motion, as well as the other coſts under the *4th & 5th of Anne*, upon quaſhing a *defective writ of error*; but otherwiſe, if the defect of the writ was occaſioned by his own acts, as by entering continuances on the judgment, or delaying the ſigning of judgment till *the writ of error* is ſpent.

The above ſtatutes give coſts to *defendants in error* [the plaintiffs in the original action]; but no coſts are thereby given to defendants below, if the plaintiffs in the original action bring error. But to give ſuch defendants relief it was enacted,

" That if, after judgment given for the " *defendant* in any action, the plaintiff or " demandant ſhall ſue any writ of error, " and the ſaid judgment ſhall be afterwards " affirmed, or the writ of error be *diſconti-* " *nued*, or plaintiff ſhall be nonſuit therein, " *the defendant or tenant* in every ſuch writ " ſhall have judgment to recover his coſts " againſt ſuch plaintiff or demandant, and " have execution for the ſame by *ca. ſa. fi.* " *fa.* or *elegit*." 8 & 9 *W.* 3. *c.* 11. *ſ.* 2.

If defendant below has judgment, and plaintiff below brings error thereon, and ſuch judgment is reverſed, plaintiff can

Of Costs in Error.

can only have the *costs* of the original action; because the statutes 3 *Hen.* 7. and 8 & 9 *W.* 3. extend only to the case of affirmance of judgment; and the court above, on reversal of a judgment, only gives such judgment as the court below ought to have given; and consequently, as no costs are given by any statute in such case, the plaintiff can have but the costs of his *original* action.

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